IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-942

UNITED STATES FIDELITY AND GUARANTY COMPANY,
Petitioner,

v.

THE HONORABLE MILES W. LORD, JUDGE OF THE UNITED STATES DISTRICT COURT DISTRICT OF MINNESOTA, FOURTH DIVISION,
Respondent,

AND

SHEILA MEAD AND TERRY OAKLEY, AND ALL OTHER PERSONS SIMILARLY SITUATED, AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

United States Fidelity and Guaranty Company petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in this case on September 13, 1978.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1) is reported at 18 Fair Employment Practices Cases 171. The Decision of the District Court (App. 57) is reported at 18 FEP Cas. 158. Other District Court opinions in this matter are reported at 442 F. Supp. 114, 18 FEP

Cas. 140 (App. 13) and at 18 FEP Cas. 131, 136, 167 (App. 75), and 169.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 (1). The Circuit Court's jurisdiction over the case was invoked pursuant to the All Writs Act, 28 U.S.C. §1651. The District Court has jurisdiction over the case pursuant to §706(f)(3) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(f)(3).

QUESTIONS PRESENTED

1. Whether the Circuit Court erred in holding that it had no power to issue a writ of mandamus to vacate a class certification order.

2. Whether the Circuit Court erred in holding that the District Court's order certifying a nationwide, across-the-board sex discrimination class action was not an abuse of discretion.

STATUTES AND RULES INVOLVED

1. All Writs Act, 28 U.S.C. §1651(a). The Supreme Court and all Courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

2. Federal Rules of Civil Procedure, Rule 23 (App. 81).

STATEMENT

Sheila Mead and Terry Oakley filed a Complaint against United States Fidelity and Guaranty Company, *et al.*, in the United States District Court for the District of Minnesota, on January 13, 1977.[1] The Complaint

[1] The full caption of the case is *Sheila Mead and Terry Oakley, and all other persons similarly situated, Plaintiffs, and Equal Employment Opportunity Commission, Plaintiff-Intervenor v. United States Fidelity and Guaranty Company, L.K. Merz, Howard Gould, Robert Rowe and John H. Aitken, Defendants.*

alleged that Plaintiff Mead had been subjected to a retaliatory discharge and also alleged class-wide sex discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* The individual claim was severed from the class action and tried, resulting in a judgment for the Plaintiff being entered on September 14, 1977 (App. 13). On October 5, 1977, the Plaintiffs filed a motion for class certification, supported by the Equal Employment Opportunity Commission, which was then seeking leave (later granted) to intervene in the class action aspect of the case. The Plaintiffs' motion sought certification of a nationwide class consisting of all past, present and future female employees and applicants for employment with the Company from July 5, 1965 to the present.

In support of their Motion, the Plaintiffs submittted the affidavit of E.E.O.C. counsel David Zugschwerdt, which informed the Court that there was a Commissioner's charge pending against the Company, that the E.E.O.C. had conducted a preliminary investigation of the charge, that the Company had an "Employees' Guide to Personnel Practice," and that it was the opinion of the E.E.O.C. that the Company's employment decisions were made centrally, rather than in the field by local branch office management. The affidavit also contained a set of statistics, compiled from annual reports submitted to the E.E.O.C., comparing the employment of females in clerical and management job categories with general labor force statistics.

In response to the Plaintiffs' Motion, the Company argued that the class sought by the Plaintiffs would be unmanageable and that it failed to satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure. In particular, the Company submitted

affidavits pointing out that it employed over 8,000 persons, 5,000 of whom were female, in its Home Office in Baltimore, Maryland, and in 59 branch office in 45 different states. The Company showed that each branch office contained ten different departments, encompassing over 40 different jobs, and that local management was responsible for the hiring, promotion, demotion, discipline, transfer and firing of employees. The function of the Home Office, the affidavits stated, was to provide general policy guidelines and to consult with branch office managers, but not to make actual employment decisions affecting individuals. Because of the branch managers' autonomy, the Company argued, the Plaintiffs failed to satisfy Rule 23 with regard to employees in other branch offices. The lack of common supervision, the Company contended, would make the class sought unmanageable because there would be different facts and circumstances surrounding the employees in the Company's 60 different offices.

On November 22, 1977, the District Court certified the class, consisting of:

> all past, present and future women employed at Defendant United States Fidelity and Guaranty Company at any of its offices in the United States since July 5, 1965, and all past, present and future female applicants for employment with Defendant United States Fidelity and Guaranty Company at any of its offices in the United States since July 5, 1965.

On January 13, 1978, the District Court issued its Memorandum Accompanying Order Certifying Case as Class Action (App. 57). This Memorandum, which is virtually the Plaintiffs' motion retyped, makes no mention of the points in opposition raised by the Company. It does state:

> Defendant USF&G is headquartered in Baltimore, Maryland and has fifty-eight branch offices located in thirty-eight states. Although each office varies in number of persons employed, the average size of each branch office is eighty to one hundred employees. In total, USF&G employs over 7,500 people of whom over 4,500 are women. For all of the time relevant thereto, USF&G's total workforce has been 58% or greater female. USF&G has centralized and uniform personnel policies as evidenced by the Supervisors Guide which was referred to during the course of the Mead retaliatory discharge trial. Throughout all of its offices, defendant uses the same personnel standards and forms and applies uniform personnel policies throughout its entire organization. USF&G has developed and utilized in its employment policies and practices a written job description which identifies the basic qualifications and grade for each job at USF&G (App. 58).

The Memorandum then sets forth statistical tables, derived from the statistics in the Zugschwerdt affidavit. Based on the facts set forth, the Court held that the Plaintiffs had satisfied the requirements of Rule 23 with regard to a national, across-the-board class.

On January 19, 1978, the Company's application for certification of interlocutory appeal pursuant to 28 U.S.C. §1292(b) was denied by the District Court. (App. 75). Subsequently, on February 21, 1978, the Company filed a Petition for Writ of Mandamus in the United States Court of Appeals for the Eighth Circuit, seeking relief from the class certification order.[2]

In its Petition, the Company argued that because of the branch office supervisors' autonomy, the District Court erred in finding that the Plaintiffs satisfied Rule 23 with regard to employees in other branch offices. This error, the Company argued, was not a technicality

[2] The Petition for Writ of Mandamus also concerned the District Court's failure to establish a class cut-off date, and the order permitting the E.E.O.C.'s intervention. These issues will not be pursued here.

for it led to certification of a class that was so diverse that it was inherently unmanageable. The difficulty in explaining decisions made in 60 offices in 45 states, concerning over 5000 class members, would, it was contended, place a virtually impossible burden on the Company in rebutting the Plaintiffs' claims.

The Company further noted that the existence of certain centralized documents, forms, and general policies did not make the nationwide class appropriate because the centralized policies are sexually neutral and consistently impose upon branch office managers the duty to make specific personnel decisions.

On March 23, 1978, the Court of Appeals ordered the Plaintiffs to respond to the Petition and stayed the case pending resolution. The Plaintiffs filed briefs arguing that the writ of mandamus was not available and that the record supported the class certification order, pointing in particular to the various documents issued by the Home Office personnel department. Oral argument was held on May 17, 1978.

On September 13, 1978, the Circuit Court issued its decision denying the writ (App. 1). In its decision, the Court stated that mandamus was not available to review discretionary decisions, such as class certification orders, and that there was ample evidence before the District Court to support its exercise of discretion to certify the class. It further noted that class certification is conditional, and that the class may be redefined if necessary.

REASONS THE WRIT SHOULD BE GRANTED

The Company is cognizant of this Court's recent decisions, issued after oral argument was held before the Court of Appeals, which stress the extraordinary nature of mandamus, *Will v. Calvert Fire Insurance Co.*, ___ U.S. ___, 98 S. Ct. 2552 (1978), and which limit

interlocutory appeals of rulings denying class action status, *Coopers & Lybrand v. Livesay*, ___ U.S. ___, 98 S. Ct. 2454 (1978); *Gardner v. Westinghouse Broadcasting Co.*, ___ U.S. ___, 98 S. Ct. 2451 (1978).[3] The Company submits, nonetheless, that when a class action ruling goes beyond the bounds of the district court's discretion, review by means of mandamus should be available, notwithstanding the conditional nature of the order. It further submits that the class ruling in this case constituted an abuse of discretion, for which the writ should have been issued. These arguments raise important questions of federal law and procedure, which should be, but are not yet, decided by this Court.

1. *The availability of mandamus.*

This Court has not decided whether the writ of mandamus is available to review a class certification order. Such powers, the Company submits, are appropriate, under the branch of the law of mandamus permitting circuit courts to review district court decisions that constitute a clear and irreparable abuse of discretion. In *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957), the circuit court issued a writ vacating the district court's reference of a complex anti-trust case to a master. The Supreme Court affirmed, stating, "the exceptional circumstances here warrant the use of the extraordinary remedy of mandamus." 352 U.S. at 256.

An extremely overbroad class certification order has much in common with an erroneous reference to a

[3] The "death knell" cases are distinguishable from this case on the ground that they involve decisions not to certify a class, which impose no prejudice to the plaintiff's right to seek individual relief. Moreover, the Company here does not seek review as a matter of right, but discretionary review, with, however, the discretion vested in the Circuit rather than the District Court. *Cf.* 28 U.S.C. §1292(b).

master.[4] Class rulings, like references, are a discretionary matter of judicial management (although the discretion is more closely confined under F.R.C.P. Rule 53(b)). Erroneous class certifications, like errors in making reference to a master, are ultimately reversible upon appeal, but by the time of appeal irreversible harm has already been done, because the parties have been subjected to extremely costly litigation, which cannot result in a lawful judgment.

That a class certification order is conditional should not bar issuance of a writ. As a practical matter, a conditional class certification will govern the litigation of the case, and is not likely to be reconsidered, except perhaps in fashioning relief.[5] Courts should not allow the label of "conditional" to obscure the fact that district courts may abuse their discretion in initially certifying classes, to the great detriment of litigants.

[4] At least one Circuit, the Third, has employed the writ of mandamus to consider class action discovery questions in employment discrimination cases. In *Rogers v. United States Steel Corp.*, 508 F.2d 152 (3rd Cir. 1975), the court issued a writ of mandamus to vacate a district court order restricting the plaintiffs' communications with class members. In *Western Electric Co., v. Stern*, 544 F.2d 1196 (3rd Cir. 1976), it issued a writ of mandamus directing the district court to permit the defendant to serve certain disputed interrogatories. In *Coles v. Marsh*, 560 F.2d 186 (3rd Cir. 1977), the court again issued a writ to vacate orders restricting communication with class members.

[5] Professor Miller has stated:

> In terms of the dynamics and economics of class actions, and most particularly in a Rule 23(b)(3) damage case, the lawyers believe that whether the case will be certified as a class action under Rule 23(c)(1) is the single most important issue in the case. All the lawyers' weapons and all of the litigants' resources tend to be mobilized to deal with that question. Defense lawyers believe that their ability to settle the case advantageously or to convince the plaintiff to abandon the case depends on blocking certification. Conversely, plaintiffs' lawyers believe that their ability to obtain a large settlement turns on securing certification.
>
> *Inasmuch as almost all class actions are settled, from the district judge's perspective certification also probably represents the single most important question in the administration of a particular class action.*

A. Miller, An Overview of Federal Class Actions: Past, Present and Future 12 (1978) (emphasis added).

The cost aspect of class action litigation should not be ignored. Although this Court expresses far more concern with judgments than with procedural questions, especially on interlocutory appeals,[6] the cost of class action litigation is often greater than the amount of judgments in what would be considered large scale civil litigation. The courts should be particularly sensitive to litigation costs in class action litigation, because class actions are a creature of the courts, authorized by Rule 23 and by judicial decisions to expand litigation beyond the immediate named litigants, and because they involve active management of litigation by courts, rather than the traditional judicial passivity, and thus present added potential for judicial abuse.[7]

[6] *Gardner v. Westinghouse Broadcasting Co.*, 98 S. Ct. at 2453, note 7.

[7] In *Lamphere v. Brown University*, 553 F.2d 714, 717 (1st Cir. 1977), the Court stated, "there is no substantive right to protection from unnecessary litigation." Rule 23, however, requires that district courts manage and control class action litigation, with an object certainly being avoidance of unnecessary expense. It is an extremely shortsighted view that ignores the burden of litigation in promoting social causes, one which has prompted great public hostility. United States Dept. of Justice, Proposed Revisions in Federal Class Damage Procedure, S. 3475, Bill Commentary 1-6, (August 25, 1978).

2. *The Circuit Court erred in ruling that the District Court's order did not constitute an abuse of discretion.*

This Court has devoted virtually no attention to the problem of class certification,[8] which is one of the most important issues facing employment discrimination litigants and the overburdened federal courts. This case presents an opportunity to consider the problem of class certification, at the inception of the litigation, and to rule on the proper scope of employment discrimination class actions.[9]

One purpose of the common question and typicality requirement of Rule 23(a) is to ensure that classes are cohesive, in other words, that the class issues are identical to or closely related to the issues raised by the representative plaintiffs, such that it is economically efficient to engage in mass rather than individual litigation.[10] In this case, the named Plaintiffs were employed in the employer's branch office in Minnesota. Indisputably, routine employment decisions affecting

[8] As a result, litigants strain to apply the language of *East Texas Motor Freight v. Rodriquez*, 431 U.S. 395 (1977). See discussion of interpretations of *Rodriquez* in *Shelton v. Pargo, Inc.*, ___F.2d ___, 17 FEP Cas 1413 (4th Cir. 1978).

[9] The fact that this case comes to the Court without a verdict on the merits is in one respect a point in favor of its consideration. Here, there is no finding of class wide discrimination that would be a barrier to reversing class certification, nor a verdict for the defendant, who wishes to preserve the *res judicata* effect of the decision. Unlike *Rodriquez, supra*, this case presents the class certification issues in their normal context, and is thus an apt vehicle for Supreme Court review.

[10] There is a school of thought exemplified in *Lamphere v. Brown University, supra*, which holds that Title VII class actions have virtually the same scope as individual cases. This view is not borne out by practice, especially in "across-the-board" cases where the class issues include a variety of allegations which plaintiffs have no standing to raise as individual plaintiffs. See discussion of across-the-board class actions in *Shelton v. Pargo, supra*.

them were made by local supervision, within a neutral framework provided by the Supervisors' Guide to Employee Practices, and other personnel documents. The Company does, of course, have a Home Office personnel department, but its involvement in the field is limited to referrals of questions by local supervisors and dealing with serious grievances, such as E.E.O.C. charges. Under these circumstances, the issues raised by the Plaintiffs' own employment are largely separate and distinct from the question concerning the employment of other persons throughout the nation.[11]

The District Court's errors are not mere legal technalities correctable upon appeal. The result of the errors is that the Company is forced into simultaneous defense of class action allegations involving 60 different offices in 45 states, which may involve completely different facts. Any one of these offices could be the subject of lengthy and difficult litigation involving protracted discovery and extensive use of statistics. The Company's problem is compounded by the allocation of the burden of proof. The Plaintiffs may make out a prima facie case relatively easily, by introduction of appropriate labor force statistics. The Company's burden then is to explain that static picture by use of dynamic analysis dealing with the process of hiring, promoting and transferring of employees throughout the many different offices.[12] It is an extremely difficult task to create such an analysis for any corporation. It is perhaps an impossible task in this case, where the

[11] *N.O.W., St. Paul Chapter v. 3M.*, 14 FEP Cas. 829 (D. Minn. 1977). In *Hauck v. Xerox Corp.*, 78 FRD 375 (E.D. Pa. 1978), the Court distinguished between allegations concerning disparate impact of an identifiable policy, and allegations of disparate treatment. Disparate impact questions may be inherently common to a class, while disparate treatment questions are likely to vary from supervisor to supervisor, and location to location. The allegations in this case involve disparate treatment.

[12] *Hazelwood School District v. U.S.*, 433 U.S. 299 (1977).

corporation is not only large, but is geographically diffuse and, unlike a manufacturing operation, involves a large number of different skilled jobs. Moreover, to the extent that defense involves consideration of individuals as evidence of practices, the Company would be required to present innumerable witnesses in order to establish a picture of practices in all of its separately supervised locations. For these reasons, the Company submits that the class certified by the District Court is inherently unmanageable, to the extent that its certification constituted an abuse of discretion.

The District and Circuit Courts have taken an optimistic view of the problem of manageability in this case, noting that the class order may be revised if necessary.[13] The experience of other courts, however, teaches that hopeful assumptions about the manageability of cases frequently result in disaster. No better example can be found than the case of *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157 (5th Cir. 1978). In its fourth opinion in that case, which it remanded for still more consideration by the district court, the Fifth Circuit wrote:

> The length of litigation in complex Title VII class actions often rivals that of even the most notorious antitrust cases. In the instant case, we encounter another judicial paleolithic museum piece. Last year this court, speaking in retrospect but proving to be prophetic as well, cited Pettway III as an example of the time and expense which must be incurred before the dust of combat has finally settled in employment discrimination class actions. *Cotton v. Hinton*, 559 F.2d 1326, 1331, 15 FEP Cases 1342, 1344 (5th Cir. 1977). Little did we then realize that we were dealing with atomic fallout rather than mere dust. At the beginning of our 57 page opinion in *Pettway III* we stated, perhaps naively, that

[13] On November 3, 1978, the District Court issued an order referring this case to a master for discovery and trial.

> "Although the path of this law suit is strewn with the corpses of intermediate decision, the posture of the present case on appeal will hopefully allow final resolution. In order to accomplish that the opinion must unfortunately be long and complex." 494 F.2d at 216, 7 FEP Cases at 1119 (footnote omitted). As is now evident, the fallout continues to radiate, and our earlier optimism regarding the disposition of this case has mutated to less hopeful emotions. 576 F.2d at 1168.

The *Pettway* case not only illustrates the horrible quagmire that courts and litigants can create in class action cases,[14] but also makes it clear that denial of an appropriate interlocutory appeal may very well increase, rather than decrease, the amount of judicial time and resources the crowded courts of appeals may have to devote to a particular case.

[14] See also *Johnson v. Ga. Highway Express*, 417 F.2d 1122, 1126 (5th Cir. 1969) (Godbold, J. concurring):

> Envision the hypothetical attorney with a single client, filing a class action to halt all racial discrimination in all the numerous plants and facilities of one of America's mammoth corporations. One act, or a few acts, at one or a few places, can be charged to be part of a practice or policy quickening an injunction against all racial discrimination by the employer at all places.
>
> It is tidy, convenient for the courts fearing a flood of Title VII cases, and dandy for the employees if their champion wins. But what of the catastrophic consequensces if the plaintiff loses and carries the class down with him, or proves only such limited facts that no practice or policy can be found, leaving him afloat but sinking the class?

CONCLUSION

In conclusion, the Company submits that the amorphous, nationwide, across-the-board class certified by the District Court poses such substantial problems of manageability that it constituted an abuse of discretion, which the Circuit Court should have cured by issuance of a writ of mandamus. The Supreme Court's recent decisions, the Company submits, do not bar issuance of the writ, where, as here, a district court has misapplied Rule 23 in creating a class that would be virtually impossible to properly defend, in view of the enormous and unprecedented number of persons, geographic diffusion and diverse positions and qualifications involved.

WHEREFORE, the Company respectfully requests that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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December 1978

APPENDIX

United States Court of Appeals
for the Eighth Circuit

No. 78—1127

United States Fidelity and Guaranty Company, L. K. Merz, Howard Gould, Robert Rowe, and John Aitken,

Petitioners,

v.

The Honorable Miles W. Lord, Judge of the United States District Court for the District of Minnesota, Fourth Division,

Respondent,

and

Sheila Mead and Terry Oakley, and all other persons similarly situated, and Equal Employment Opportunity Commission,

Respondents.

Submitted: May 19, 1978
Filed: September 13, 1978

Before HEANEY, Circuit Judge, STEPHENSON, Circuit Judge, and BECKER, Senior District Judge.

BECKER, Senior District Judge.

* The Honorable William H. Becker, Senior District Judge, Western District of Missouri, sitting by designation.

PETITION FOR WRIT OF MANDAMUS

In this class action litigation petitioners pray for a writ of mandamus commanding the respondent (1) to limit an order of the respondent district judge, certifying a national plaintiff class, (2) "compelling" the respondent to limit to Minnesota and set a cut-off date for the class conditionally, and (3) to vacate an order permitting the Equal Employment Opportunity Commission (EEOC) to intervene in the action.

The petitioners are defendants in the civil action pending before the respondent United States District Judge in the Fourth Division of the United States District Court for the District of Minnesota. The action in question is pending on a class action complaint filed by Sheila Mead and Terry Oakley, former employees of United States Fidelity & Guaranty Company (USF&G) until January and April, 1977, respectively. The amended complaint seeks to enforce provisions of Title VII of the Civil Rights Act of 1964, on their behalf individually and a "company-wide" class of "all female persons who have been, or are presently employed or might be employed and all past, present and future female applicants for employment at defendant USF&G offices throughout the United States . . . ." (Supplemental Appendix, "S.A." hereinafter, 3).

In the amended complaint ("complaint" hereinafter) plaintiffs Mead and Oakley allege that the defendant USF&G is a Maryland corporation, doing business in Minnesota and elsewhere in the United States (S.A.2); that the "following company-wide practices, policies, rules, regulations, customs and usages made unlawful by Title VII, have been and continue to be uniformly instituted and/or maintained by defendant USF&G throughout all of its offices in the United States" (S.A. 3, 4); and that USF&G has discriminated and continues to discriminate against plaintiffs individually, and members of the alleged national class of female employees solely on the basis of sex (S.A. 3-8). The complaint alleges discrimination in practically every imaginable detail, including generally discriminatory

denial of recruitment, training, promotion, equal pay, equal status, opportunities for transfer and employment as underwriters, outside claim adjusters, assistant supervisors, supervisors, management and higher paying "policy level positions" (S.A. 5, 6).

In Count I, ("Claim I" in complaint) plaintiffs Mead and Oakley allege discriminatory denial of their requests for training and transfer to positions of underwriters, and that they and other female employees have been segregated into clerical, secretarial, and other "non-professional, low-paying, dead-end job classifications with no promotional opportunities," in contrast to the different treatment of males (S.A. 7).

In Count I, plaintiff Mead alleges that she was pregnant in 1976; that upon learning of her pregnancy the defendants attempted to discourage her from continuing her employment by unsupported adverse reviews of her work, and by "encouraging her not to return to work following her pregnancy" (S.A. 7, 8); that USF&G delayed her return to employment, when she was ready for return, solely because of her pregnancy and the denial, solely because of her pregnancy, of other benefits for illness and disability, available to other employees (S.A. 7, 8).

In Count II, plaintiff Mead alleges that she filed a charge of discrimination with the EEOC in May, 1976 (S.A. 8); that in retaliation the defendants harassed, intimidated and coerced her by assigning excess work to her, excessive monitoring of her work, depriving her of the assistance of other employees, unsupported adverse reviews, denial without just cause of a raise in pay, and wrongful discharge within several days of receipt by her of notice of a right to sue (S.A. 8).

In Count III, plaintiff Mead alleges damage from discrimination described in Count I, and in addition discrimination in maternity benefits, measured by non-pregnancy benefits in the "company-wide group medical insurance plan" of USF&G in violation of the

Minnesota Human Rights Act, as amended, Minn. Stat. 363.03 subdivision 1(2) (S.A. 9).

The individual defendants, Merz, Aitken, Gould, and Rowe, are alleged to have been or to be presently officers in the Minneapolis office of USF&G in which the individual plaintiffs were employed, and to have participated in the alleged discrimination.

Exhaustion of "jurisdictional and administrative remedies" of Title VII and the Minnesota Human Rights Act is alleged in the complaint.

The complaint contains allegations that the requirements of paragraphs (a), (b)(2), and (b)(3) of Rule 23 F.R.Civ.P. have been met (S.A. 3).

The relief prayed for is (a) declaration by the court that the alleged discriminatory practices are unlawful; (b) a preliminary injunction against USF&G, its agents, successors, employees, directors, officers, and attorneys from continuing the alleged unlawful practices; (c) order USF&G "to make whole" plaintiffs, and members of the class, by "backpay, front pay and otherwise, all individuals who have been adversely affected" by the alleged discrimination; (d) reinstatement of plaintiff Mead to employment by USF&G, and enjoining the defendants from subjecting her to special regulations or denying her equal employment; (e) award of punitive damages against USF&G; (f) other general relief including, but not limited to, orders directing recruitment, hiring, training, promotions of plaintiffs and class members; and (g) award of attorneys' fees and costs to plaintiffs under § 2000(e)-5(k), Title 42 U.S.C., and Minn. Stat. 363.14, subd. 3 (S.A. 10, 11).

Before certification of the class, the district court for fourteen days heard evidence on the claim for relief of plaintiff Mead for retaliatory discharge, and found that she was constructively discharged in retaliation for her filing of charges of discrimination with the EEOC.

On November 22, 1977, the district court ordered that the action below be certified as a compulsory class

action under paragraph (b)(2) of Rule 23, F.R.Civ.P., on behalf of a class defined as "all past, present, and future women employed by defendant 'USF&G' at any of its offices in the United States since July 2, [sic] 1965, and all past, present, and future female applicants for employment with defendant 'USF&G' at any of its offices in the United States since July 5, 1965" (A. 10, 11). The minor discrepancy in the dates July 2, 1965, and July 5, 1965 (the date Title VII of the Civil Rights Act of 1964 became effective) appears to be a clerical error easily correctable.

The EEOC was granted leave to intervene as plaintiff intervenor and to file a complaint in intervention, pursuant to Rule 24(b)(1) F.R.Civ.P. and to Sections 705(g)(6) and 706(f)(1) and (3) as amended, Title VII of the Civil Rights Act, 42 U.S.C. § 2000(e) *et seq.*

This leave to intervene was first limited to intervention in the claim in Count II of plaintiff Mead for retaliatory discharge (A. 1-9). Later after allowing time for conciliation efforts, without results, the district court granted leave to the EEOC to intervene as a party plaintiff without restriction, after General Counsel of EEOC certified that the action was one of general public importance, pursuant to Rule 24(b)(1) F.R.Civ.P. and Sections 705(g)(6) and 706(f)(1) of Title VII of the Civil Rights Act of 1964 as amended, Sections 2000e(4)(g)(6) and (5)(f)(1), Title 42 U.S.C. (A. 12-15).

On January 13, 1978, the district court entered a carefully prepared memorandum of findings of fact, conclusions of law, and affirmation of its prior order certifying the action as a class action. The full text of this memorandum, with caption omitted, is attached hereto and entitled Addendum (A. 16-30).

After the filing of the complaint by plaintiffs Mead and Oakley, the district court consolidated an action brought by EEOC pursuant to Section 706(f)(2) of Title VII with the Mead claim for relief based on alleged retaliation. Later, the EEOC moved to intervene in the original action, alleging a pattern of nationwide

discrimination. A certificate of the General Counsel of EEOC was issued certifying that the action was one of "general public importance" under Section 706(e), Section 2000(a)-3(e), Title 42 U.S.C. The class allegations of the complaint in intervention were substantially the same as those in the (amended) complaint of Mead and Oakley. Originally the district court allowed the EEOC to intervene only in respect to the retaliation claim of plaintiff Mead. In respect to the complaint of nationwide discrimination, the district court stayed the action for sixty days requesting that the EEOC make a prompt offer to conciliate. After the district court extended the time for conciliation, the EEOC advised the district court that conciliation could not be achieved. In the meantime, the district court heard the retaliation claim of Mead and found from the evidence that USF&G had retaliated against Mead for filing a charge of discrimination with the EEOC. Thereafter, on the basis of affidavits of the parties, including those of EEOC, uncontroverted documentary evidence and other evidence in the trial of the retaliation claim, the district court conditionally certified the nationwide class under paragraph (b)(2) of Rule 23, retaining power to correct, modify or supplement the class action certification under paragraph (c)(1) of Rule 23 (A. 10, 11).

This order was expanded by the filing of the detailed findings of fact contained in the order set out hereinafter as an addendum (A. 16-30).

After the original certification of the class, the EEOC was permitted to intervene in the action on the complaint as a whole (A. 12-15).

Petitioner USF&G requested that the district court enter an order certifying a discretionary interlocutory appeal under Section 1292(b), Title 28 U.S.C. The district court denied this request (A. 31-37).

For the reasons stated herein, the petition for a writ of mandamus will be denied in respect to all the requests, including that the definition of the class be limited to Minnesota, that an "appropriate cut-off date"

for the class be ordered, and that the order permitting EEOC to intervene be vacated.

I.

Availability of Mandamus

Petitioner USF&G argues that under the All Writs Act, Section 1651, Title 28 U.S.C., mandamus is available to review the propriety of a conditional class action certification, the entry of which is discretionary. The cases cited by petitioner from this circuit do not support the contention of petitioner.

The rule in this circuit on review of interlocutory discretionary conditional class action orders is stated in *In re Cessna Aircraft Distributorship Antitrust Litigation*, (C.A. 8 1975) 518 F.2d 213, l.c. 215-17, *cert. denied*, 423 U.S. 947, 96 S.Ct. 363, 46 L.Ed.2d 282, *reh. denied*, 423 U.S. 1039, 96 S.Ct. 577, 46 L.Ed.2d 414 (1975), in a comprehensive opinion by Judge Stephenson, as follows:

> In the instant case, appellant Cessna initially argues that all orders granting class action status to cases involving substantial claims for monetary damages should be appealable under § 1291. However, the *Eisen* decision appears to reject such an across-the-board determination of appealability. *See* 417 U.S. at 170, 94 S.Ct. 2140. Alternatively, Cessna contends that the particular facts of this case require that we entertain this appeal in accordance with the dictates of the *Cohen* doctrine. Our examination of the record in this case and the nature of an order granting class action status under Rule 23 convinces us that the order here is not sufficiently "final" or "collateral" to justify appellate review at this time.
>
> Under Rule 23 the district court is given broad discretion to determine the maintainability and the conduct of class actions. *See Wilcox v. Commerce Bank*, 474 F.2d 336, 344 (10th Cir. 1973); *City of New York v. International Pipe & Ceramics Corp.*, 410 F.2d 295, 300 (2d Cir. 1969). By the very language of the rule, any order rendered by the district court regarding the maintenance of the

class action "may be considered conditional, and may be altered or amended before any decision on the merits." Fed.R.Civ.P. 23(c)(1). Thus, in discharging its obligations to assure the "fair and efficient adjudication of the controversy," the district court retains the power to establish subclasses or to terminate the class status if subsequent developments so dictate. *See Wilcox, supra,* 474 F.2d at 344. The district court in this case specifically retained these powers in the order which granted the class status. Given these facts, it is apparent that the order here cannot be considered "final" in the manner indicated by the *Cohen* and *Eisen* decisions. (Citations omitted.)

Nor do we feel that the issue here is so divorced from the merits that effective review cannot be had after a final judgment is entered. Cessna's contentions regarding the propriety of the district court's order focus on the ability of White Industries to serve as the class representative. Cessna argues that White Industries, Inc. as a former dealer has a conflict of interest with present dealers that makes it an unfit representative. In addition, Cessna argues that the claims of price discrimination in a Robinson-Patman Act case are individualized as to each dealer and cannot be the subject of class action treatment. Obviously, if this court were to entertain these issues, it would be plunging headlong into the merits of the case. Each of these issues can be raised and fully ventilated on appeal following a final judgment. Consideration at this time would serve no justifiable judicial purpose. *See Thill Securities Corp., supra,* 469 F.2d at 15-16; *Walsh, supra,* 412 F.2d at 227.

In so holding that the order in this case is interlocutory and not appealable under § 1291, we are not suggesting that early appellate review of such orders is necessarily foreclosed in every case. For example, the district court could have certified this appeal under either § 1292(b) or Fed.R.Civ.P. 54(b) if it felt that the gravity of the class action certification issue required an expedited hearing by this court. As recently stated by the Third Circuit

in *Samuel v. University of Pittsburg,* 506 F.2d 355, 361 (3d Cir. 1974), by using these alternative means of review "the knowledge bred of the district court's proximity to the case can be brought to bear on the question of the propriety of immediate review." *See also Katz v. Carte Blanche Corp.,* 496 F.2d 747, 753-56 (3d Cir. 1974); *Hackett v. General Host Corp.,* 455 F.2d 618 (3d Cir. 1972). It is significant to note that the district court in this case refused to certify this appeal under § 1292(b).

Finally, the remedy of mandamus remains available in those extraordinary instances when the district court, in granting the maintenance of a class action, has exceeded "the sphere of its discretionary power." (Citations omitted.)

In the instant case, appellant Cessna has filed a mandamus petition as an alternative means of obtaining review by this court. The petition requests that we either direct the district court to certify the class action orders for appeal under § 1292(b) or simply reverse the lower court's granting of class action status. Nothing in the record or briefs in this case convinces us that such extraordinary relief is required. As stated by the Supreme Court in *Will,* the writ of mandamus is one of the "most potent weapons in the judicial arsenal." 389 U.S. at 107, 88 S.Ct. at 280. Where, as here, there is absolutely no showing that the district court abused its judicial power in granting the class action, this drastic action cannot be invoked. (Footnotes omitted.)

The rule of the *Cessna* case was followed in *Sperry Rand Corp. v. Larson,* (C.A. 8 1977) 554 F.2d 868 in which the petitioner sought mandamus to compel decertification of a class certified by the district court under paragraph (b)(2) of Rule 23, as in this case. In the *Sperry Rand* case, l.c. 872, Judge Webster carefully and properly distinguished *Schmidt v. Fuller Brush Co.,* (C.A. 8 1975) 527 F.2d 532, relied on by petitioner in this case.

The rule of the *Cessna* and *Larson* cases is consistent with the recent decisions of the Supreme Court of the

United States forbidding piecemeal review of class action orders in the absence of a certification of a discretionary interlocutory appeal by a district court under Section 1292(b), Title 28, U.S.C. *Coopers & Lybrand v. Livesay*, ___ U.S. ___, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978); *Gardner v. Westinghouse Broadcasting Co.*, ___ U.S. ___, 98 S.Ct. 2451, 57 L.Ed.2d 364 (1978).

Mandamus is not available to review and control the exercise of lawfully authorized discretion by a district court. *Will v. United States*, 389 U.S. 90, 88 S.Ct. 269, 19 L.Ed.2d 305 (1967); *Kerr v. United States District Court*, 426 U.S. 394, 96 S.Ct. 2119, 48 L.Ed.2d 725 (1976).

Petitioner complains of some alleged procedural errors of the district court. The denial of the writ of mandamus is without prejudice to the right of the petitioner to complain of any error on an authorized appeal.

The same reasons that make mandamus unavailable to compel a district court to vacate a discretionary class certification order, make the writ unavailable to limit membership in the class to persons in a particular state and to limit the class by a particular time period of employment or eligibility of employment.

There was ample evidence before the district court to support the exercise of its discretion to certify a national class.

If it later appears that a national class is judicially unmanageable, the district court can redefine the class or create subclasses, on its own initiative, or on motion of any party. Attention is invited to the feature paragraph (b)(3) that the provisions of the second sentence thereof relating to pertinency or manageability in subparagraph D is applicable expressly only to class action under paragraph (b)(3). Nevertheless, it is assumed, for the purposes of this opinion, that there is an implied condition of manageability in class actions under paragraph (b)(2) also.

II.

Intervention by the EEOC

There remains for determination the contention of petitioners that this court should issue mandamus to require the district court to vacate the order permitting the EEOC to intervene "on an unlimited basis." The petitioners argue in support of this contention that EEOC may expand the scope of the original action by proposing an earlier cut-off date; that the EEOC was permitted to intervene without having proceeded first through the four-step sequential processes of (1) receiving a timely charge, (2) investigating the charge, (3) determining the charge, and (4) conciliation.

In response to these arguments, the EEOC correctly argues that the district court under the applicable statutes, federal rule of civil procedure, and controlling decisions of this court, was vested with the discretionary power to permit EEOC to intervene, originally in the claim for relief of Mead based on retaliation, and later in the action of plaintiffs based on alleged nationwide discrimination.

In approaching the question of intervention, the district court followed the controlling decision of this court in *Johnson v. Nekoosa-Edwards Paper Co.* (C.A. 8 1977) 558 F.2d 841, *cert. denied, Nekoosa Papers, Inc. v. Equal Employment Opportunity Commission*, 434 U.S. 920, 98 S.Ct. 394, 54 L.Ed.2d 276 (1977).

After permitting EEOC to intervene in the retaliation claim of plaintiff Mead, the court stayed the principal action based on alleged claims of nationwide discrimination for sixty days for conciliation efforts. The stay was extended thereafter until the EEOC advised the court that conciliation was not possible. In the meantime, the General Counsel had, on behalf of the Attorney General, certified the action as one of general public importance pursuant to Section 706(e) of The Civil Rights Act of 1964, Section 2000a-3(a) Title 42 U.S.C. This section authorizes the district court to permit the EEOC to intervene in such circumstances. Rule 24(b) of the Federal Rules of Civil Procedure

confirms the right of permissive discretionary intervention when "a statute of the United States confers a conditional right to intervene." In *Johnson v. Nekoosa-Edwards Paper Co., supra,* this court approved the power of the district court, in its discretion, to permit the EEOC to intervene prior to an attempt to conciliate and prior to completion of the administrative processes. While the complaint in intervention (S.A. 12-16) in this action did not substantially extend the scope of the (amended) complaint, this court, in the *Nekoosa-Edwards* case, *supra,* held that the district court, in its discretion, could permit intervention which broadened the scope of the original action. The rule of the *Nekoosa-Edwards* case, *supra,* to defer intervention of the EEOC until conciliation had failed was followed in this action by the district court.

In ruling on intervention we have emphasized the power of the district court to allow the challenged permissive intervention, in its discretion, because as demonstrated in Part I hereof, mandamus will not lie to review the exercise of a lawful discretion of a district judge, not only in class action rulings, but also in other exercises of discretion, including orders granting leave for permissive intervention.

For these reasons, the district court will not be required to vacate the order permitting the EEOC to intervene, or to limit the scope of the intervention by EEOC.

The petition for a writ of mandamus is hereby denied in respect to each prayer for relief without prejudice to their rights to assign error on an appeal authorized by law.

U.S. District Court, District of Minnesota

MEAD, et al., and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Intervenor v. UNITED STATES FIDELITY AND GUARANTY COMPANY, Nos. 4-77-16 and 4-77-42, September 14, 1977.

Action under Title VII of Civil Rights Act of 1964 by former employee and EEOC against employer. Judgment for former employee.

See also 18 FEP Cases 131, 442 F.Supp. 102; and 18 FEP Cases 136, 442 F.Supp. 109.

Frank E. Vogl, Frederick W. Morris, and Thomas D. Carlson (Best & Flanagan), Minneapolis, Minn., for plaintiffs.

Grant E. Morris and Katherine S. McGovern, Washington, D.C., for intervenor.

Timothy R. Thornton and David J. Byron (Rider, Bennett, Egan, Johnson & Arundel), Minneapolis, Minn., for defendants.

Full Text of Opinion

LORD, District Judge:

Findings of Fact, Conclusions of Law, Order for Judgment on Plaintiff Mead's §704(a) Retaliatory Discharge Claim

JURISDICTION

This matter originally came on for hearing on plaintiff Sheila Mead's Motion for Temporary and Preliminary Relief filed on January 13, 1977, and plaintiff Equal Employment Opportunity Commission's Petition for Temporary Relief filed on February 1, 1977, pursuant to Section 706(f)(1)(2) and (3) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(1)(2) and (3), as amended by Public Law 92-261, 88 Stat. 103 (March 24, 1972) [Title VII]. Jurisdiction was vested in this Court to hear the matter by §706(f)(1)(2) and (3) of Title VII, 42 U.S.C. §2000e-5(f)(1)(2) and (3) and 28 U.S.C. §§451, 1343, and 1345. The parties stipulated that the actions be "consolidated for the limited purpose of

determining the issue of retaliatory discharge of Sheila Mead since both causes involve common questions of law and fact, and that consolidation will reduce cost and delay." On, February 3, 1977, this Court ordered Consolidation pursuant to the stipulation.

Hearings were held on the request for temporary relief on January 14, 24, 25, 26, 27, February 7, 8, 9, 10, 11, 23, 25 and May 12, 1977. At the May 12, 1977, hearing the Court announced its intention to bifurcate the Mead retaliation claim from the remainder of the action, pursuant to rule 42(b) of the Federal Rules of Civil Procedure and to order the trial of the §704(a) Mead retaliation claim on the merits to be advanced and consolidated with the hearing on the requests for temporary relief. The Court so ordered by its Memorandum and Order dated June 8, 1977, specifically directing that the issue to be resolved by the hearing on the merits of the Mead retaliation claim was "whether or not plaintiff Mead's termination was in violation of Section 704(a) of Title VII and, if so, what appropriate remedies, if any should follow therefrom." The Court's Memorandum on Jurisdiction, dated July 8, 1977, addresses the basis of the Court's jurisdiction over the petitions for temporary relief and the trial on the merits of the §704(a) Mead retaliatory discharge claim.

On July 12, 1977, the Equal Employment Opportunity Commission, [hereafter EEOC or the Commission] issued Ms. Mead a Right to Sue letter on her §704(a) retaliatory discharge claim. By its Memorandum and Order on Intervention, dated August 15, 1977, this Court granted the Motion of the EEOC to Intervene in the §704(a) Mead retaliatory discharge claim. The final hearing on the merits of that claim was also held on August 15, 1977.

After hearing and observing witnesses, reviewing the exhibits received in evidence, the affidavits, the certification, and considering the Verified Complaint, the Motion for Temporary Relief, the Petition for Temporary Relief, the briefs and arguments of counsel and reviewing all the files, records and proceedings,

herein, the Court makes the following FINDINGS OF FACT, ADDITIONAL CONCLUSIONS OF LAW, AND ORDER:

FINDINGS OF FACT

1. Plaintiff Sheila Mead is a female U.S. Citizen and resident of the State of Minnesota.

2. Plaintiff Equal Employment Opportunity Commission is an administrative agency of the United States Government charged with the enforcement of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972. 42 U.S.C. §2000e, et seq.

3. Defendant United States Fidelity and Guaranty Company [hereafter USF&G] is a Maryland corporation with its principle place of business in Baltimore, Maryland. Defendant USF&G does business in the State of Minnesota, with a branch office located in Minneapolis, Minnesota, where it is engaged in the insurance industry and related activities and, as such, is engaged in an industry affecting interstate commerce. At all times relevant herein, USF&G has employed more than 15 persons, has been an employer within the meaning of §701(b) of Title VII, 42 U.S.C. §2000e(b), and has been engaged in an industry affecting commerce within the meaning of §701(h) of Title VII, 42 U.S.C. §2000e(h).

4. On March 27, 1972, Ms. Sheila Mead was employed by defendant USF&G as a multi-line rate clerk/typist in the Fire and Marine Department. Ms. Mead worked for USF&G until January 7, 1977 when her employment was terminated.

5. Defendant L. K. Merz was, until January 7, 1977 and at all material times prior thereto, the branch manager in charge of the Minneapolis office of defendant USF&G (TR. 158-160). Defendant Howard Gould is and has been at all material times hereto the Superintendent of the Fire, Marine and Multi-Line Department [Fire Department] of the Minneapolis office

of defendant USF&G (TR. 329). Defendant Rowe is and has been at all material times hereto the Assistant Superintendent of the Fire Department of the Minneapolis office of defendant USF&G (TR. 43-45). Defendants Merz, Gould and Rowe are agents of defendant USF&G within the meaning of 42 U.S.C. §2000e(b).

6. On or about May 5, 1976, plaintiffs Sheila Mead and Terry Oakley filed timely administrative charges against defendant USF&G with the EEOC and the Minnesota Department of Human Rights. Plaintiff Mead filed her charge on behalf of herself and a nationwide class of all female employees employed by USF&G and alleged that USF&G has and is discriminating against both herself and all other female employees on the basis of sex with respect to hire, tenure, compensation, terms upgrading, conditions, facilities and privileges of employment. Ms. Mead further alleged that her employer, USF&G, has and is discriminating against both herself and all other female employees employed throughout the Company by having a practice of treating disabilities related to pregnancies and childbirth differently from other temporary disabilities and by discriminating against female employees because of their pregnancies by treating them differently with respect to compensation, terms, conditions, and privileges of employment. On July 29, 1976 Ms. Mead amended her charge on behalf of herself and all other women employees at USF&G to state that, in addition to the unlawful discrimination charges which she had alleged her employer practiced in the May 5, 1976 charges, she alleged that USF&G as an employer discriminates against herself and all other women in its consideration of applications for jobs, promotions, and training, and with respect to compensation, conditions and privileges of employment. Additional charges of unlawful employment discrimination on the basis of sex were filed against USF&G with the EEOC and the Minnesota Department of Human Rights on or about October 11, 1976 by Amy Quinn LaVoie and Lesley Deaton; and on November 5, 1976 by

Lynn Sibernagel. On or about January 11, 1977, the EEOC issued plaintiff Mead a Notice of Right to Sue on her charges (Pl. Exs. 22, 23, 24, and 25).

7. On or about January 10, 1977, Sheila Mead filed a charge with the EEOC which asserted that she had filed sex discrimination charges with the EEOC on May 5, 1976, and that thereafter, USF&G retaliated and discriminated against her for having filed the charge by unfairly overloading her with work, depriving her of the assistance provided similarly-situated employees, preparing adverse work reports and, on January 7, 1977, discharging her.

8. On January 13, 1977, plaintiff Mead filed a Complaint in federal district court pursuant to Sections 703 and 704(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-2, 3(a) and filed a Petition for a temporary restraining order, and for preliminary and permanent injunctive relief under Rule 65 of the Federal Rules of Civil Procedure. In Count I of her Complaint Ms. Mead alleges that USF&G has and continues to discriminate against herself and a nationwide class of all its female employees by operating under company-wide policies and practices which limit and discourage recruitment of women, which discriminate against women with respect to hiring, job classification, management training programs, disabilities related to pregnancies, promotions and other terms and conditions of employment. That charge is not before this Court at the present time, except insofar as it is alleged to the basis of and cause for the Company's retaliation, harassment, reprisals, and, ultimately, discharge of Ms. Mead.

Count II of the Complaint, which is the subject of the present proceedings, alleges that in May, 1976, the defendants learned of the sex discrimination charges filed by Ms. Mead on May 5, 1976, and that thereafter, in retaliation for filing that charge, the defendant USF&G through its agents harassed, intimidated and coerced plaintiff Mead by, among other things, monitoring her work with greater frequency than other

employees similarly situated, depriving her of assistance provided other employees similarly situated, making unsupported adverse review about her work and discharging her.

9. Upon receipt of Ms. Mead's §704(a) charge, the Commission conducted a preliminary investigation into the alleged retaliation. Based upon its preliminary investigation, the Commission concluded that prompt judicial action was necessary to carry out the purposes of the Title. On February 1, 1977, the Commission filed a Petition for Temporary Relief, and related pleadings, pursuant to Section 706(f)(2) and (3) of Title VII. 42 U.S.C. §2000e-5(f)(2) and (3) in the United States District Court. On February 3, 1977, based on the Stipulation of Counsel for plaintiffs Mead and EEOC and defendants USF&G, Merz, Gould and Rowe, the Court ordered consolidation of the Motion of Plaintiff Mead and the Petition of Plaintiff EEOC. On or about July 14, 1977, the EEOC issued plaintiff Mead a Notice of Right to Sue on that charge of retaliation.

10. In the early part of May, 1976, defendant Merz, the Branch Manager of the Minneapolis Office of USF&G, received copies of the complaints Sheila Mead had filed with the EEOC and the Minnesota Department of Human Rights, and he spoke with the home office and department superintendents about those complaints. (TR. 161-62). Fire and Marine Department Superintendent Gould and Assistant Superintendent Rowe were also notified in early May that Ms. Mead had filed charges with the EEOC alleging sex discrimination by defendant USF&G. (TR. 383-75).

11. There are six positions in the Fire Department at USF&G: Superintendent, Assistant Superintendent, Underwriter, Assistant Underwriter, rater and code clerk (TR. 364-367). The next promotion from the position as an Assistant Underwriter A is to the position of Underwriter (TR. 375-376). For a period of at least 16 years and until sometime after plaintiff Mead filed her sex discrimination charges on May 5 and July

29, 1976, no female employee had ever held the position of Underwriter, Assistant Superintendent or Superintendent in the Fire Department (TR. 372, 537). For this 16 year period and up to the present, no male employee has ever held the position of Assistant Underwriter, Code Clerk or Rater (TR. 364-367, 538).

12. Plaintiff Mead commenced employment with defendant USF&G on March 26, 1972 and received training for her job as a multi-line rate clerk. This training consisted of another multi-line rater sitting at Ms. Mead's desk with her and going over rating projects and answering questions. In 1972 and 1973 Ms. Mead conducted training sessions for two new employees in the Fire and Marine Department.

13. Plaintiff Mead established a very good work record with defendant USF&G over several years of employment (Pl. Exs. 7-12). Plaintiff Mead's record establishes the following merit pay increases and promotions:

March 26, 1972	Plaintiff Mead was hired as a rate clerk typist grade 7 in the Fire Department at $110.00 per week (Pl. Ex. 7)
August 27, 1972	Plaintiff Mead received a merit increase of $8.50 per week (Pl. Ex. 8)
April 22, 1973	Plaintiff Mead was promoted to Assistant Underwriter B and received a merit increase of $10.50 per week (Pl. Ex. 9)
October 7, 1973	Plaintiff Mead received a merit increase of $11.00 per week (Pl. Ex. 12)
May 4, 1974	Plaintiff Mead was promoted to Assistant Underwriter A and received merit increase of $12.00 per week (Pl. Ex. 10)
June 29, 1975	Plaintiff Mead received a merit increase of $11.40 per week (Pl. Ex. 11)

14. During 1975 there were three assistant underwriters in the Fire and Marine Department at USF&G's Minneapolis branch office: Ms. Sheila Mead, Miss Ellen Bunting, and Mrs. Laura Steinert. The Superintendent of the Fire and Marine Department was Mr. Howard Gould. Mr. Gould has been Superintendent of the department for 16 years, and has been an employee of USF&G for 29 years. The Assistant Superintendent of the Fire and Marine Department was Mr. Robert Rowe. Mr. Rowe has been Assistant Superintendent, since 1972, and has been employed by USF&G for 13 years. As Assistant Superintendent, Mr. Rowe was Ms. Mead's immediate supervisor.

15. The issue before this Court is whether or not the defendants lawfully terminated Ms. Mead's employment at USF&G. It is the contention of the defendants that Ms. Mead did not properly perform the duties of an assistant underwriter and therefore that her discharge was justified by poor work performance. In order to evaluate this contention, it is necessary to compare the duties of an underwriter to those of an assistant underwriter in the Fire Department, to examine what those duties are, whether or not they are clearly and consistently defined, and to what extent they overlap.

16. An underwriter in the Fire and Marine Department has as a primary responsibility the judgmental decision of whether or not USF&G will accept a particular risk and write an insurance policy for such a risk. An underwriter's job is a judgmental job that calls for the exercise of a great deal of discretion in determining whether or not to write a particular risk. In order to make the underwriting decisions involved, it is necessary that the underwriter have information about the risk in order that he may judge the company's exposure in accepting a risk. Moreover, the underwriter must know the premium that will be charged for the risk in determining whether acceptance of the risk is likely to be profitable.

17. The primary responsibility of a multi-line rate clerk and an assistant underwriter is to assist the

underwriters. The distinction between an assistant underwriter A and multi-line rate clerk is that an assistant underwriter A has more responsibility, is paid more and has the ability to rate more varied lines of insurance.

The assistant underwriter or rate clerk renders assistance to the underwriter by calculating the premium to be charged. This process is called "rating." Both Howard Gould, the Superintendent of the Fire, Marine and Multi-Line Department of the Minneapolis Office of USF&G, Ms. Mead's department, and Robert Rowe, the Assistant Superintendent of the Fire Department, testified about the nature of the assistant underwriter's duties. Mr. Gordon Hies, an underwriter with the Fire Department for one year and nine months and Mr. William Allen Stanley who had been an underwriter for three years during the time of Ms. Mead's employment also testified about the nature of the job.

This Court finds that the only clear conclusion which can be drawn about the duties comprising the assistant underwriter's job and the nature of the interrelationship between the assistant underwriter's and underwriter's job is that neither the jobs nor the interrelationship has been clearly and consistently defined at USF&G. This Court further finds that neither job duties nor their interrelationship has been clearly and consistently communicated to the underwriters and the assistant underwriters at USF&G. Defendant Gould's testimony about the nature of the jobs and the relationship between them contradicted Mr. Rowe's testimony. Mr. Rowe's description of the duties was internally inconsistent, contradictory, and, as he conceded, entirely subjective and unguided by any regularly used objective Company guidelines that he could refer to from the witness stand.

For example, one unclarified area of dispute was over who was to gather the basic information on the subject of an insurance application, and how serious the error was in the event of failure to gather the information.

Initially, Mr. Rowe testified that if the information was inadequate the assistant underwriter should contact the underwriter. If the underwriter agreed that the information was insufficient, someone would contact the source (the agent or the applicant). At this point, Mr. Rowe testified that it was not a major error for an underwriter to send an assistant underwriter insufficient information, but that it was a major error if the assistant underwriter proceeded to develop the rate on the basis of insufficient information. He answered affirmatively when he was asked if he expected more of an assistant underwriter than of an underwriter. Later, however, Mr. Rowe testified that it was the duty of the assistant underwriter alone to determine if she had received sufficient information to enable her to develop the rate on the subject to be insured. If she had received inadequate information, it was the assistant underwriter's duty to contact the agent or applicant without first consulting the underwriter. At this point Mr. Rowe explained that the obligation was solely that of the assistant underwriter because the underwriter, for example, might have received the request for insurance through the mail and would merely pass it on to the assistant underwriter.

18. The rating process performed by the assistant underwriter is not an objective determination of the proper rate for the proper risk, for the following reasons. First, the steps to be taken in the rating process are not consistently and clearly defined in the Fire Department. Second, there is discretion in the rating process to determine when the information is complete and where the rate comes from. Third, the norm by which to determine adequate performance is subjective, as conceded by Ms. Mead's immediate supervisor, Mr. Rowe.

19. There are different types of insurance policies which assistant underwriters in the Fire Department work on. A package policy is a policy insuring against a number of perils for a particular risk. The varied coverages involved in a package policy can complicate

the rating process. A risk that involves a number of locations can also complicate the rating process.

Commercial insurance policies are commercial risks and often provide for insurance against a number of perils. When a single policy is issued that insures against multiple perils, it is called a package policy. USF&G issues three types of package policies. These policies are referred to as SMPs, CIPs, and MIPs. On SMP policies the rating of the property and fire coverage as well as the casualty and general liability coverage is performed by the Fire and Marine Department. On CIP policies and MIP policies the property and fire rating is done by the Fire and Marine Department and the general liability rating is done by the Casualty Department.

20. An assistant underwriter is also called upon to complete premium adjustment reporting forms. Premium adjustment reporting forms are used when an insurance policy is issued to insure a risk with fluctuating value. For example, a merchant wishing to insure his inventory with a fluctuating value uses a reporting adjustment form. The merchant reports the value of inventory every month and that value is recorded. At the end of the policy period, one year or three years, the monthly values of the merchant's inventory are averaged and the premium figured. The merchant then receives a refund or additional billing for premiums.

21. USF&G concedes that Ms. Mead's work performance was satisfactory until April, 1975, at which time it allegedly began to become unsatisfactory. One complaint made in support of the charge of unsatisfactory performance is that Ms. Mead was unable to competently complete premium adjustment reporting forms. The difficulty with reporting forms was allegedly one of the "basic errors" which justified the discharge. However, this Court finds on the basis of a review of the record as a whole, that this allegation was only a pretextual reason given to justify the discharge in

retaliation for the filing of the sex discrimination charge.

There is no record of Company dissatisfaction with Ms. Mead's performance on premium adjustment forms until the Rowe memo of August 6, 1975 (Def. Ex. 2). This is because, as Mr. Gould, the Fire Department Superintendent testified, Casey Jones was the sole person assigned to make out premium adjustment forms up until 1975 and no one else worked on them before she left the department. Ms. Mead did not start working on final adjustment forms until sometime in 1975. Moreover, Ms. Mead had no prior experience with these forms at USF&G and she had not been trained in her previous job to work on the adjustment forms because the work on them had been done by a special unit.

After Casey Jones left, Ellen Bunting, Laura Steinart and Sheila Mead took turns working on the forms. Then Ellen Bunting asked if she could exclusively handle the forms and was permitted to. The adjustment forms were not put on Ms. Mead's desk again until December, 1975. Ms. Mead's pregnancy leave commenced on December 15, 1975, and she returned to work on April 26, 1976.

The only person who was able to cite a specific example of Ms. Mead's poor performance on the adjustment reporting forms was Ms. Mead, herself. She testified that she had trouble with adjusting the rate for the insured Peter Van Erkl. Finally she asked her coworker, Mrs. Laura Steinart, to check over her work. Mrs. Steinart checked it over, told Ms. Mead that was the way she would do it. Ms. Mead had the rate typed up and mailed out. Two weeks later it was returned to her as "wrong." (TR. 672-75).

This incident does not indicate that Ms. Mead was lax or negligent in her attempts to fill out the final adjustment reporting forms. To the contrary, when she had difficulty, Ms. Mead consulted another employee who was reputed to be very competent in handling these forms. Moreover, in so doing, Ms. Mead resorted

to the only available on-the-job aid present at USF&G. To level the blame for this incident against Ms. Mead, without any simultaneous criticism of the review of Ms. Mead's work by Mrs. Steinart supports this Court's conclusion that citing Ms. Mead's inadequate performance on the final adjustment forms was a pretextual reason for firing her.

22. The types of insurance coverage and the costs of such coverage are continuously fluctuating. Changes in insurance coverage and cost of insurance coverage requires changes in the rating manual. Assistant underwriters are responsible for insuring that their rating manuals and rule books are up-to-date so as to reflect the current coverages and insurance costs.

23. Another allegation made to justify Ms. Mead's discharge in 1977 for unsatisfactory work performance was that Ms. Mead failed to keep her manuals up to date. However, the only evidence offered to prove this assertion was the following. Mr. Gould testified that sometime in 1975 prior to Ms. Mead's maternity leave, Mr. Rowe found manual pages in a file. Ms. Mead was said to have been the only person working on the file and so it was concluded that the pages belonged in her manual. However, Mr. Gould was unable to identify the name of the file in which the pages were found and unable to state that the pages did not relate to that particular file. No record was made of the incident at the time it occurred. Neither Mr. Rowe nor Mr. Gould could recall any other instance when Ms. Mead's manual pages had been out of place or out of date. (TR. 382-83, 411-14).

The evidence is very scanty here and the Court is tempted to reject it. But even if the evidence is taken at its best and viewed in the light most favorable to the defendants, this Court finds that there was evidence of only one isolated incident when Ms. Mead's manual pages were not in her manual. No other evidence was offered to prove that her manual pages were out of place or out of date. The evidence does not support the initial allegations that there was a pattern of such incidents.

To the contrary, the evidence shows only that on one occasion, Ms. Mead may have inadvertently left the pages from her manual in a case file which she was working on. To cite this one isolated incident as a reason for the allegedly poor work performance which resulted in her discharge well over one year later, leads to the inference that the reason given for discharge was merely a pretextual one, without actual merit.

24. During the late winter and early spring of 1975, Ms. Mead was having marital difficulties. It is the contention of the defense that as a result of these difficulties, there was a decrease in the quantity and quality of work performed by Ms. Mead. The Court finds that the evidence did not support the contention. Among other things, Ms. Mead received a merit increase of $11.40 per week on June 29, 1975. The raise itself suggests that Ms. Mead's work up to that time was satisfactory and there was no memo to the contrary in her file as of that date.

25. USF&G asserted that an indication of Ms. Mead's unsatisfactory performance was excessive personal use of the telephone. But, the inferences to be drawn from the evidence were inconclusive as to the amount of time Ms. Mead spent on personal telephone calls in the spring of 1975 in comparison to the amount of time spent on such calls by the other employees. No records were kept monitoring the amount of personal telephone calls made by employees. Nor was there any objective method available for discerning how frequently employees made such calls or whether a three minute call was a business call to an agent or a personal call.

In fact, the evidence indicated that Mrs. Laura Steinart was the source of supervisor Rowe's information regarding Ms. Mead's use of the telephone. (TR. 1010). Moreover, Mrs. Steinart testified that while she knew that Sheila Mead was on the phone for personal reasons, she did not know whether the people who sat near her were on the phone for personal reasons or not.

Furthermore, Mrs. Steinart stated that with the exception of one girl who came to work late for three weeks, the only people she had made adverse reports to Mr. Rowe about were Sheila Mead and two others who had filed sex discrimination claims with the EEOC (1038-39).

Finally, Mrs. Steinart stated that she had never taken written notes specifying the times and dates of Ms. Mead's use of the phone, but had just made her reports verbally.

It was conceded by the Assistant Superintendent that Ms. Mead was the only employee who had ever had a written memo inserted into her personal file evaluating her use of the telephone for personal matters.

26. Laura Steinart testified that she was asked in 1975 by Superintendent Gould to report problems in the department to him or Robert Rowe. (TR. 1024). Mrs. Steinart admitted that she observed Ms. Mead's behavior more than that of the others in the department and that she only reported the infractions of Ms. Mead and the other two women in her department who had filed sex discrimination charges. (TR. 1031, 1040).

27. On June 12, 1975, Ms. Mead was advised by her doctor that she was pregnant. (TR. 572-74). Assistant Superintendent Rowe, Ms. Mead's immediate supervisor, was informed of Ms. Mead's pregnancy by August 12, 1975 at the latest. (TR. 575, 918, 951). The secretary to Mr. Merz, the Manager of the Minneapolis office, knew of Ms. Mead's pregnancy prior to August 1, 1975. (TR. 545). William Stanley, an underwriter in the Fire Department, found out that Ms. Mead was pregnant during the summer of 1975. (TR. 951). And Ms. Mead gained 18 pounds between March, 1975 and late August, 1975 due to her pregnancy. (TR. 577).

28. Thereafter, although she had never received an adverse memorandum or "write-up" during the prior forty months that she had worked for USF&G and although she had received a merit increase on June 29, Ms. Mead received three adverse write-ups during the

period from August 6 through September 11, 1975. (Def. Exs. 1-4, TR. 368-70, 505-06).

Two of these memoranda were the first formal work evaluations Ms. Mead had received since she had been promoted to the position of assistant underwriter in March, 1973, despite a Company policy which called for an annual review of assistant underwriters. When asked why Ms. Mead had received two performance evaluations within a month when she had not received a timely annual evaluation before, the Assistant Superintendent merely stated that the "company likes forms." (TR. 282). The defendants were similarly unable to satisfactorily explain why they had waited until August, 1975, to write up the adverse reports of Ms. Mead when the allegedly inadequate work performance had been a problem since April, 1975.

29. Sometime in November, 1975, Ms. Mead spoke to Mr. Gould, Superintendent of the Fire Department, about a maternity leave of absence and stated that her tentative plans were to return to work about the first of March, 1976. Mr. Gould said that was fine and requested that she call the Company a couple of weeks before she wished to return. On December 15, 1975, Ms. Mead commenced her pregnancy leave.

30. Ms. Mead visited Mr. Gould at USF&G on February 16, 1976 and requested an extension of her pregnancy leave until April 12, 1976. He told her that was fine and that she should call a couple of weeks before she returned. (TR. 588). Ms. Mead spoke with Mr. Gould again on March 11, 1976.

Mr. Gould called Ms. Mead during the third week of March, 1976, and asked her if she was planning to return to work. She responded affirmatively. Mr. Gould called again on April 7, 1976 to ask if Ms. Mead was going to return to work. When she responded affirmatively, Mr. Gould stated that he hadn't known that she wanted her job back and that he would have to speak with Mr. Merz to see if she could get her job back. (TR. 590-91). Ms. Mead returned to work on April 26, 1976.

31. Prior to Ms. Mead's return to work, Superintendent Gould called a meeting with the other two Assistant Underwriters, Ellen Bunting and Laura Steinart. These two women had made adverse reports to Assistant Superintendent Rowe which he, in turn, had incorporated into a memo to Superintendent Gould on August 12, 1975. At that time Mr. Rowe had made the following evaluation of the remarks of Mrs. Steinart and Miss Bunting about Ms. Mead's performance:

> . . . The problem really seems to be one of the rest of the girls being down on her for being such a conversationalist. Her errors while admittedly are present, are greatly magnified when discovered by the other girls . . . . I think we should get the "Big 3" together with Sheila and discuss the fact that harmony, if only on the surface, must come about or our services will suffer.

32. On May 5, 1976 Ms. Mead filed a charge with the EEOC and the Minnesota Department of Human Rights alleging that the defendants USF&G and Manager Merz had discriminated against herself and all other female employees on the basis of sex and that the Company specifically discriminated against women with respect to the treatment of pregnancies. Mr. Rowe and Mr. Gould were notified of these charges shortly thereafter, in the early part of May. (TR. 161-162, 383-85).

33. After the defendants received notice that Ms. Mead had filed her employment discrimination charges with the EEOC and the Minnesota Department of Human Rights, they engaged in the following retaliatory acts, one of their intentions being to document Ms. Mead's personnel file with work-related reasons which could be cited as the pretextual reasons for firing her.

A. After he had become aware that Ms. Mead had filed her employment discrimination charge, Mr. Gould instructed Miss Bunting, Mrs. Steinart and Mr. Rowe to monitor Ms. Mead's work. Mr. Gould specifically instructed the employees to report mistakes made by Ms. Mead to him. (TR. 462, 525).

It was not the regular business practice to have employees monitoring each other's work and report other employees' errors to the Assistant Superintendent or the Superintendent. This Court finds that the monitoring was established in response to the notice that Ms. Mead had filed an EEOC charge.

B. In July, 1976, after he had become aware that Ms. Mead had filed an employment discrimination charge, Mr. Gould gave a project called the City of Fargo quote to Mr. Rowe and specifically told him to have Sheila Mead prepare it because he wanted to monitor her work. (TR. 459, 520). After Ms. Mead worked on the quote, Mr. Gould had Mr. Rowe return it to him and Mr. Gould personally checked the quote for error. It was not the regular business practice for Mr. Gould to check the assistant underwriters' work for errors.

Although Mr. Gould stated that he had run several other spot checks on Ms. Mead's work during 1976, he could not recall anything about the other spot checks: how many there were; when they occurred; or the names of the insureds. (TR. 520-21). When asked why Ms. Mead was not fired at this point, Mr. Gould replied that "You don't fire anybody for one or two mistakes." (TR. 524).

This Court finds that the purpose of the spot checks was to locate some work-related reasons which could be cited as a pretext for firing Ms. Mead because she had filed a charge with the EEOC.

C. On July 1, 1976, Ms. Mead's personnel file was documented with statements she allegedly made to another employee concerning her charges filed with the EEOC. (Pl. Ex. 17).

D. On July 6, 1976, Ms. Mead's personnel file was documented with a minor mathematical error and a "short-coming" even though prior to the filing of her charges, defendants Rowe and Gould did not have a policy of documenting such matters and had never documented anyone else's personnel file with such minor errors. (TR. 79, 108-109, 113, Def. Exs. 9 and 10).

E. On or about August 16, 1976 defendant Merz wrote a memorandum of his phone conversation with Vice President Adams of defendant USF&G's home office in Baltimore, Maryland concerning building and documenting a case against plaintiff Mead and Oakley because they filed charges. Among other things, defendant Merz wrote:

> If we wish to 'fire' either or both [Plaintiffs Mead and Oakley], we must document the moves of the two of them over a period of time. If discharge should be on the basis of nonproductiveness, their output must be documented, as well as all other people in the department for comparative purposes. We must have a documented case in the event we went to court. (Pl. Ex. 28, TR. 1250-1263).

F. On August 26, 1976, Ms. Mead's personnel file was documented for the alleged misconduct of others (Pl. Ex. 6).

G. Sometime in the fall of 1976, management had knowledge that Ms. Mead had filed her EEOC charge, an incident occurred in the Casualty Department which the Company contended illustrated improper conduct by Ms. Mead. Mr. Dale C. Webster, the Superintendent of the Casualty Department, observed Ms. Mead sitting at a desk with Kathryn Fairchild, an underwriter clerk. When asked what they were doing by Mr. Webster, the women informed him that they were rating a risk. According to his testimony, they could finish the risk, but from now on the underwriter clerk was not to help any Fire personnel with the casualty rating portion of SMP policies unless an underwriter was unavailable. In that event, the underwriter clerk was only to offer help with rates, not rating. According to Ms. Fairchild, Mr. Webster spoke to her alone, admonished her not to help Ms. Mead, and said he would be the "culprit." (TR. 776-804, 740-42).

It is necessary to make a credibility resolution in order to discern the significance of this incident. SMP policies require casualty rating and rates. Since 1975 Ms. Mead had been seeking help from personnel in the

Casualty Department with the casualty portion of the SMP policies and, as Mr. Webster testified, he had never objected or said anything at all to Ms. Fairchild about assisting Sheila Mead. (TR. 798). The Court takes note of the fact that the purpose of Ms. Mead's visits, as described by Mr. Webster, was obviously work related. Moreover, Mr. Webster testified that it was only after he had knowledge that Ms. Mead had filed a sex discrimination charge with the EEOC that he objected to Ms. Mead obtaining assistance from a casualty underwriter clerk. (TR. 799-800). Thus, Mr. Webster's objection was, in effect, a policy change of an established practice, in response to Ms. Mead's filing of the charges with the EEOC.

Miss Ellen Bunting, another assistant underwriter in the Fire Department, testified that she regularly visited her roommate, Sherri Wood, during work time in the Casualty Department to ask Ms. Wood for Guide A rates and help in classifying. Miss Bunting testified that she visited Ms. Wood every time she had a problem, which might vary anywhere from a couple of times a day to once every three days. (TR. 1085-88). Miss Bunting further testified that she had never been reprimanded or had an adverse memo inserted in her file because she left the Fire Department to speak with Ms. Wood in the Casualty Department. (TR. 1087).

The Company contention that Miss Bunting's visits to Ms. Wood were justified only because Ms. Wood was an underwriter impress the Court as unconvincing and after-the-fact. The pattern which emerges about the visits to the Casualty Department is that until Miss Fairchild was admonished by Mr. Webster, both Miss Bunting and Ms. Mead were permitted to visit their respective roommates and friends in the Casualty Department for help without restriction. The reasonable conclusion to be drawn from these facts is that Mr. Webster's objection and policy change was made in response to and reprisal for the filing by Ms. Mead of her charges with the EEOC.

H. In October, 1976, certain rating changes were circulated to all of the underwriters and assistant underwriters in the Fire Department except plaintiff Mead (Pl. Ex. 1).

I. On or about November 17, 1976, defendant Merz wrote to Doris Martin, defendant USF&G's Equal Employment Officer in Baltimore, Maryland, and, referring to the receipt of the fifth sex discrimination charge since May 5, 1976, stated that:

> There is every reason to feel that Ms. Mead will continue to pursue her activities in the office to influence as many people as she can to file complaints nor does there appear to be any way to stop her from this pursuit, according to advice received from you.
>
> On the other hand, the continuation of the filing of the complaints is doing this office absolutely no good whatsoever, and it is obvious to us that some action must be taken to eliminate this situation. (Pl. Ex. 27).

J. On November 18, 1976, Ms. Mead's personnel file was documented with a memorandum addressed to Ms. Martin in Baltimore concerning plaintiff Mead's interest in the problems of alcoholism as it effects defendant USF&G and denying plaintiff access to certain information because "it might lend fuel to the present fire" (TR. 166-167, 185-186, Pl. Ex. 2). In that context and in a memorandum directed to defendant's EEO officer, it is reasonable to infer that the reference to "the present fire" was to plaintiff's sex discrimination charges.

K. On November 19, 1976 Ms. Mead's personnel file was documented with an adverse memorandum concerning events which allegedly took place over one and a half years earlier. (Def. Exs. 18 and 19). In the memorandum, as well as in Court, defendant Gould conceded that "I did not document these discussions at the time (1975) because I didn't feel it was necessary." (TR. 403, Def. Ex. 18).

L. On November 30, 1976, Mr. Merz, Manager of the Minneapolis office of USF&G, wrote Ms. Mead that she would be terminated if she did not make substantial improvements in her job performance. (Pl. Ex. 3). Ms. Mead responded by requesting that she be provided with specific suggestions and additional training in order to improve her allegedly inferior job performance. The defendants did not respond to Ms. Mead's request. (TR. 405, Pl. Ex. 5). There was no explanation for their failure to respond with the exception of an assertion in a memorandum to the Court, that USF&G did not respond because management felt that it was inappropriate to conduct a personnel function through the vehicle of registered mail with copies to attorneys. The Court finds this statement to be totally inadequate as an explanation for the Company's inaction because Mr. Merz's own letter of November 30, 1976 threatening termination of Ms. Mead was sent to Ms. Mead's attorney with blind carbon copies to Mrs. Doris Martin of the Equal Employment Division of the home office, Howard Gould, Robert Rowe, and John Aitken, the Associate Manager of the Minneapolis office.

M. On December 1, 1976 a memo was inserted in Ms. Mead's personnel file which alleged that she had taken an extended lunch hour when only two weeks earlier she had been told by her immediate supervisor Rowe that "her attendance [had] been excellent and she is never late." (Def. Exs. 12 and 5).

N. On December 3, 1976, Ms. Mead's personnel file was documented with a memorandum containing repeated references to her EEO charges and allegedly inadequate job performance in 1975, almost a year and a half earlier. (Pl. Ex. 18).

O. On December 13, 1976, Ms. Mead's personnel file was documented for an alleged "backlog" of work which had not been assigned to her, which she was not asked to help clean up, and which was cleaned up by two persons in less than one day. In fact, at the time the backlog occurred there were only two assistant underwriters rather than the normal number of three. A trainee

was filling the third assistant underwriter's position and she was unable to do as much work as either Laura Steinart, whom she replaced, Ellen Bunting, or Sheila Mead. No reference to the backlog was inserted in the personnel files of Miss Bunting, Mrs. Steinart, or the trainee. (TR. 482-99, 606-07, Def. Ex. 11).

P. Assistant Superintendent Rowe individually asked Laura Steinart and Ellen Bunting to write out statements describing the complaints they had about Sheila Mead's work performance. (Def. Exs. 19, 20, TR. 491-93). Both statements were written on December 28, 1976 and inserted into Ms. Mead's personnel file. Although on their face these statements may accurately reflect Mrs. Steinart's and Miss Bunting's opinion of Ms. Mead's work performance, the evaluations must be taken to be the product of the management effort to document Ms. Mead's file and establish a pretextual reason for firing her since the statements were written as a result of the supervisor's request addressed directly to each woman alone.

Q. On January 7, 1977, Mr. Gould informed Ms. Mead that her employment with USF&G was terminated. Mr. Gould informed Ms. Mead that the reason for the termination was "poor job performance," although he also told her that she had a lot of fine qualities and that she wouldn't have any trouble finding a new job. (TR. 506, 609-10). Mr. Gould gave Ms. Mead four weeks of severance pay at the direction of Manager Merz, despite a Company rule which provides for only two weeks salary in lieu of notice upon termination. (TR. 532-33).

34. Defendants have relied heavily upon the allegation that Ms. Mead was constantly making errors. (TR. at 69, 437, 458, 870-71, 928, 1002, 1041). One underwriter testified that for two years Ms. Mead consistently made errors on 50% of the work which she performed for him. (TR. 944). This Court finds that the testimony is unreliable. The witness stated that for two years he had spent more than half of his time reviewing and correcting Ms. Mead's work, (TR. 954-56), despite the

fact that neither Ms. Mead's immediate supervisor, Mr. Rowe, nor Mr. Gould, the superintendent, had referred to this 50% error ratio in their prior testimony. Furthermore, the witness stated that there had been 50% error in Ms. Mead's work since at least December 1974, although Ms. Mead's immediate supervisor Rowe and Superintendent Gould testified that problems did not begin until the spring and summer of 1975.

At one point Mr. Rowe stated that it was his policy to bring errors to Ms. Mead's attention if he felt it was important (TR. at 114.) However, Mr. Rowe could not recall a single discussion with Sheila Mead about errors after she returned from pregnancy leave on April 26, 1976 (TR. at 69). Ms. Mead also testified that she could not recall any comments made to her by anyone in her department about the quality or quantity of her work from April 26, 1976 to November 17, 1976 with the exception of two instances (TR. at 599-600). When considered in the context of Mr. Rowe's statement that he would simply dismiss errors brought to his attention if he felt they were of relatively little "magnitude" (TR. at 113), the absence of conversations with Ms. Mead about alleged errors and the absence of memoranda documenting those errors gives rise to the inference that the errors were not of the frequency or magnitude described by defendant's witnesses. Alternatively, if the errors did occur as alleged, defendants' failure to discuss them with Sheila Mead is contrary to the stated policy of bringing mistakes to her attention (TR. at 114). If that is so, the Court must have been misinformed regarding the amount of assistance given to Ms. Mead (TR. at 976-77, 941-42, 1074-75, 1076-77).

35. After plaintiff Mead filed the sex discrimination charges in May, 1976, female employees Lesley Deaton and Amy LaVoie spoke with plaintiff about her charges and then on October 11, 1976 filed substantially similar charges themselves. (TR. 164, 178-179, 721-22, 768).

36. After the defendants became aware in October, 1976 of the charges of LaVoie and Deaton (TR. at 806), they engaged in the following retaliatory actions against them because they had filed charges with the EEOC.

A. Louis Hofstad, a supervisor in the claims department, told the receptionist/secretary in the claims department to maintain a log monitoring the time periods when Lesley Deaton and Amy LaVoie were on coffee and lunch breaks. (TR. 735, 838). No records on this subject were kept by management prior to receipt of their charges and no such records are maintained on other employees.

B. USF&G sent a letter to Ms. Deaton's dentist requesting substantiation of her dental appointments and the nature of her dental treatment. This letter was sent without Ms. Deaton's knowledge or consent. (TR. 735).

C. Doris Martin, the EEO coordinator at USF&G, told Ms. Deaton on or about December 8, 1976, during an office visit by Martin at the Minneapolis branch office, that "no one files a charge against USF&G and just walks away from it." (TR. 729).

D. USF&G began to prepare harsh and critical memoranda of Ms. Deaton. (TR. 725-27).

E. USF&G more than doubled the number of memoranda to Ms. LaVoie. (TR. 833).

F. During the second week in November, 1976, USF&G denied Ms. LaVoie a promotion to a position of outside adjuster on the grounds that she was unqualified, despite the fact that one month earlier (and before receipt of Ms. LaVoie's charge) she was offered that position at another branch office. (TR. 838).

37. The retaliatory acts taken against plaintiff Mead and Amy LaVoie and Lesley Deaton make those employees, as well as Kathryn Fairchild and Susan Shapiro fearful in the matter of filing charges, testify-

ing, or assisting in a proceeding under the auspices of Title VII.[1]

38. In addition to plaintiffs Mead and Oakley, and employees Deaton and LaVoie, employee Lynn Silbernagel filed sex discrimination charges. None of the five employees who filed charges against defendant USF&G were employed there eleven months after plaintiffs Mead and Oakley filed the first charges on May 5, 1976.

39. Defendant's retaliatory conduct has caused plaintiff Mead loss of her jobs, wages, fringe benefits and monetary injury. Plaintiff Mead exercised reasonable diligence in seeking interim employment and made reasonable efforts to mitigate her loss of pay. By stipulation of the parties, plaintiff Mead's loss of wages and fringe benefits because of defendants' retaliatory conduct amounts to $1,619.11 for the period from January 7, 1977 to August 1, 1977.

40. Defendants' retaliatory conduct has caused plaintiff Mead humiliation, pain, suffering and other emotional injury because she exercised her rights under Title VII.

CONCLUSIONS OF LAW AND FACT

1. The Court has jurisdiction over the parties and subject matter jurisdiction of this action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., and under 28 U.S.C. §§ 451, 1331, 1343, and 1345.

2. Defendant USF&G is an employer within the meaning of 42 U.S.C. § 2000e(b).

3. Defendants Merz, Gould and Rowe are agents of Defendant USF&G within the meaning of 42 U.S.C. § 2000e(b).

[1] By its protective order of May 23, 1977, this Court ordered the non-disclosure of the names of certain employees who specifically cited as their reason for non-disclosure their fears that reprisals would be taken by the Company.

4. All of the statutory requirements of §706(f)(1), (2) and (3) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, as amended, have been met by the plaintiffs. As set forth in its Memorandum on Jurisdiction dated July 8, 1977, this Court has had jurisdiction of the action from its commencement on January 13, 1977.

5. Pursuant to this Court's Order of June 8, 1977, the issue before the Court is whether or not plaintiff Mead's termination was in violation of §704(a) of Title VII and, if so, what appropriate remedies, if any, should follow therefrom.

6. Section 704(a) of Title VII, 42 U.S.C. §2000e-3(a) provides that it is an unlawful employment practice for

> an employer to discriminate against any of his employees . . . because [the employee] has opposed any practice made an unlawful practice by this [title], or because [the employee] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this [title].

The statute provides an employee with immunity from retaliation for actions taken in connection with his or her participation in Title VII proceedings. The purpose of this protection is to promote the implementation of equal employment rights and opportunities guaranteed by Title VII and to ensure the effective implementation and maintenance of the statutory mechanisms for protection of those rights and the elimination of unlawful employment discrimination.

[1] 7. Specific evidence of intent to discriminate is not an indispensable element of proof of violation of Section 704(a). Thus, an employer's protestation that it did not intend to discriminate is unavailing where a natural consequence of its action was such discouragement toward employees from exercising their rights under Title VII. Concluding that employees' discouragement from exercising their rights will result from acts of retaliation, it is presumed that the employer intended such consequences. Griggs v. Duke Power Co., 401 U.S. 424, 432, 3 FEP Cases 175, 178 (1971).

The parties agree that McDonnell Douglas Corp. v. Green, 411 U.S. 792, 5 FEP Cases 965 (1973) is the leading case setting forth the requirements that plaintiff Mead must satisfy in order to prevail on her retaliatory discharge claim. As in all other civil litigation, the plaintiff bears the burden of proving that the employer discriminated against her in discharging her because she opposed any practice made unlawful by Title VII, or because she has made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing under Title VII.[2] Once the plaintiff has established a prima facie case, the burden of proof shifts to the employer to articulate some legitimate nondiscriminatory reason for the dismissal. The burden then returns to the plaintiff who is afforded an opportunity to demonstrate that the reasons asserted by the employer were merely a cover-up or pretext for an unlawfully discriminatory decision.

[2] Plaintiff Mead and the EEOC have successfully proven that defendant USF&G and its agents discriminated against plaintiff Mead because she filed charges of employment discrimination with the EEOC and assisted and participated in the investigations and proceedings involving those charges.[3] Adapting the four-pronged McDonnell Douglas v. Green test to the factual circumstances of this case, this Court concludes, first, that plaintiff Mead belongs to a class protected by

[2] See also, McDonald v. Sante Fe Transportation Co., 427 U.S. 273, 12 FEP Cases 1577 (1976); Naraine v. Western Electric Co., 507 F.2d 590, 593, 10 FEP Cases 301 (8th Cir. 1974).

[3] The § 703(a) charges of sex discrimination are not before the Court at this time. But the law is clear that an employee is protected from retaliation under the "participation" clause of § 704(a) whether or not the charge filed with the EEOC is meritorious. Pettway v. American Cast Iron Pipe Co., 411 F.2d 998, 1 FEP Cases 752, 71 LRRM 2347 (5th Cir. 1969); Bradford v. Sloan Paper Co., 383 F. Supp. 1157, 8 FEP Cases 634 (N.D. Ala. 1974); Francis v. A. T. & T., 55 F.R.D. 202, 4 FEP Cases 777 (D.D.C. 1973); EEOC v. Kallir, Phillips, Ross, Inc., 401 F. Supp. 66, 11 FEP Cases 241 (S.D.N.Y. 1975).

Title VII. Second, plaintiff Mead is qualified for the Assistant Underwriter A position in the Fire and Marine and Multi-Line Department of the Minneapolis office. She was promoted to that position by the defendants and performed her work in that position for fifteen months before a single written complaint against her work was lodged in her personnel file by the defendants, after they learned of her pregnancy. Third, after the defendants learned that Ms. Mead and filed sex discrimination charges with the EEOC, they deliberately and intentionally engaged in retaliation, which culminated in the January 7, 1977, discharge, because she had filed her charge with the EEOC. The Findings of Fact speak for themselves in this regard. The main thrust of defendants' actions was to build and decument a case against Ms. Mead in an attempt to make it look as if her discharge were for the legitimate, nondiscriminatory reason of poor work performance. The defendants' intentions are summed up by the handwritten memorandum of Office Manager Merz after his August 16, 1976, phone conservation with the Company's Vice President of Personnel:

> If we wish to *'fire'* either or both [Ms. Oakley and Ms. Mead] we must document the moves of the two of them over a period of time. If discharge should be on the basis of non-productiveness, their output must be documented, as well as all other people in the department for comparative purposes. We must have a documented case in the event we went to court. [emphasis added].

The fourth criteria of the test of McDonnell Douglas v. Green has been met. There has never been an assertion by USF&G that it intended to eliminate the Assistant Underwriter A position in the Fire Department of its Minneapolis office.

The defendants attempted to justify Ms. Mead's discharge on the grounds that it was impelled by her poor work performance and personality conflicts with fellow employees. This Court concludes that both reasons were merely pretextual ones for the underlying

motivation to fire Ms. Mead because she had filed the charge with the EEOC.

The evidence does not sustain the assertion that Ms. Mead did not get along with her fellow employees, although it does support the converse, that at least one of Ms. Mead's co-employees felt hostility towards her and watched only Ms. Mead and two of the other charging parties so that she could report alleged infractions to the management. The evidence further showed that Mrs. Steinart and Miss Bunting surveyed Ms. Mead and wrote reports on her conduct at the specific request of USF&G management. Otherwise, there was no evidence of personality clashes. In fact, Mr. Rowe liked Ms. Mead and Ms. Mead first established her friendship with Kathryn Fairchild in the lunchroom of USF&G.

The only reasonable inference to be drawn from the inconsistent, sometimes contradictory evidence about Ms. Mead's work performance is that the work evaluations of Ms. Mead were made after-the-fact: after the Company had notice that Ms. Mead had filed charges with the EEOC; and, as a result of that knowledge and in reaction to it, after the Company had begun to take reprisals against Ms. Mead; and after the Company had begun to consider the possibility of retaliatorily discharging Ms. Mead and had, consequently, begun to paper her file in an attempt to establish a pretextual justification for the retaliatory discharge. It defies common business sense that the Company could have maintained Ms. Mead in its employ for two years if her rate of error was 50%. The fact, among others, that Ms. Mead remained in the Company's employ until January 7, 1977, impels this Court to conclude that her work was adequate and that she was fired because she had filed her discrimination charges with the EEOC and the Minnesota Department of Human Rights.

That is the only reasonable conclusion which can be inferred from the credible evidence submitted to this

Court. The second conclusion is so illogical that this Court rejects it, although it, too, would sustain the plaintiffs' claim. That illogical explanation is that Ms. Mead's work was indeed unsatisfactory from April, 1975, but that the Company maintained Ms. Mead on its workforce until January 7, 1977, when it felt that it was safe to fire her without detection, because she had filed her sex discrimination charges. One of the problems with this view is that although the allegedly poor work performance began in the spring of 1975, there were no adverse personnel reports of Ms. Mead's work written until she became pregnant, with the number and intensity increasing substantially after she filed her charges. In effect, the Company's defense requires this Court to accept the conclusion that the Company was willing to tolerate the unsatisfactory work of an employee for at least twenty months, giving that employee over twenty months to improve, in the meantime her supervisor's time, over 50% of the worktime of another underwriter, her co-employees' time, and the Company's good will and reputation with its agents and insureds. The evidence, with the sometimes patent references to the Company strategy of building and documenting a case against Ms. Mead in order to establish a pretextual reason for discharging her, does not verify the defendants' defense.

[3] 8. Moreover, in order to proceed, the plaintiffs need not show that the retaliatory discrimination was the sole or principal reason for the discharge but rather need only show that "retaliatory discrimination on the part of the employer contributed among other things to cause the discharge." Hochstadt v. Worcester Foundation, 545 F.2d 222, 13 FEP Cases 804 (1st Cir. 1976); Accord, EEOC v. Kallir, Phillips, Ross, Inc., supra, 401 F.Supp. 66, 72 and cases cited at n.17, 11 FEP Cases 241 (S.D.N.Y. 1976). The Court of Appeals for the Eighth Circuit has used a similar standard in interpreting a similar provision of the National Labor Relations Act which prohibits discriminating against and discharging employees for engaging in union or other concerted

protected activities. For instance, in Singer Co. v. NLRB, 429 F.2d 172, 179, 74 LRRM 2669 (8th Cir. 1970) the Court noted,

> We recognize that discriminatory treatment of employees by their employer, motivated in whole or in part by their union or protected activities violates §8(a)(3) and (1) and that "the mere existence of valid grounds for a discharge is no defense to a charge that the discharge was unlawful, unless the discharge was predicated solely on those grounds and not by a desire to discourage union activity."[4]

This Court concludes as a matter of law that there was no valid ground for Ms. Mead's discharge. But even assuming for the sake of argument, only, that the Company had sustained its burden of establishing that Ms. Mead's work performance was poor, the plaintiffs have proven that retaliatory discrimination was the sole cause for the discharge. But for the filing of the EEOC charges, Ms. Mead would still be working at USF&G today.

[4] 9. A defendant's discriminatory conduct and intent may also be inferred from circumstantial evidence. Griggs v. Duke Power Co., 401 U.S. 424, 432, 3 FEP Cases 175 (1971); Robinson v. Lorillard Corp., 444 F.2d 791, 3 FEP Cases 653 (4th Cir. 1971); Local 189, Papermakers v. United States, 416 F.2d 980, 996-97, 1 FEP Cases 875, 71 LRRM 3070 (5th Cir. 1969).

Relevant indicia are similar acts of retaliation toward other charging parties including attempts to build a record and disguise a discriminatory purpose, acts of harassment and intimidation, and the timing of the discriminatory conduct.

[4] Arbie Mineral Feed Co. v. NLRB, 438 F.2d 940, 942, 76 LRRM 2613 (8th Cir. 1971) (if "at least in part" motivated by engaging protected activities, discharge is unlawful); Cupples Co., Manufacturers v. NLRB 106 F.2d 100, 117, 4 LRRM 710 (8th Cir. 1939).

The findings indicate that several similar acts of retaliation were taken against Amy LaVoie and Lesley Deaton after they filed charges, including monitoring, surveillance, threats and documenting their personnel files.

10. In considering the appropriate remedies which should be implemented in the case at hand, the Court has found it helpful to consider analogous older statutes by which Congress has prohibited acts of retaliation against employees who resort to statutory processes and remedies.

Section 704(a) is analogous to §8(a)(4) of the National Labor Relations Act, 29 U.S.C. §158(a)(4) and §15(a)(3), 29 U.S.C. §215(a)(3) of the Fair Labor Standards Act, wherein Congress has consistently guaranteed freedom from reprisal to persons who invoke the aid of an agency, and thereby preserved the integrity of the particular administrative process which Congress has created.[5]

The Supreme Court has explained that the objective of Section 8(a)(4) of the NLRA is "to prevent the Board's channels of information from being dried up by employer intimidation of prospective complaints and witnesses." NLRB v. Scrivener, 405 U.S. 117, 122, 79 LRRM 2587 (1972). Failure to give full effect to the section would "impede resort to the Act" and thwart the

[5] Section 8(a)(4) National Labor Relations Act, 29 U.S.C. § 158(a)(4) provides:

> 8(a) It shall be unfair labor practice for an employer:
> (4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this chapter.

Section 15(a)(3) of the Fair Labor Standards Act, 29 U.S.C. § 215(a)(3) provides:

> 15(a) . . . It shall be unlawful for any person:
> (3) to discharge or in any manner discriminate against an employee because such employee has filed any complaint or instituted any procedure under or related to this chapter, or has testified or is about to testify in any such proceeding or has served or is about to serve on an industry committee.

Congressional design for "implementation of this country's labor policies." Nash v. Florida Industrial Commission, 389 U.S. 235, 239, 66 LRRM 2625 (1967).

Likewise, in §704(a) of Title VII, the proscriptions of retaliation and reprisal have been provided so that an employee will not forego filing a charge out of fear that s/he may lose his or her job or suffer other reprisals from his or her employer if s/he files one.[6] The language of §704(a) is even broader than the language of §§8(a)(3) and (4) of the NLRA and §15(a)(3) of the FLSA and thus this Court concludes that Congress intended that persons who file charges with the EEOC are to be fully protected from any retaliation, both to secure the rights of the charging party and to avoid chilling the actions of others who might sue to implement the guarantees of the Act.

In the case at hand, four employees, Ms. Deaton, Ms. LaVoie, Ms. Shapiro and Ms. Fairchild testified that they all were fearful as a result of Ms. Mead's termination. While fear is not an element of proof in a retaliation claim, it is precisely one of the end results which §704(a) seeks to avoid.

[6] See Mitchell v. De Mario Jewelry Co., 361 U.S. 288, 292, 14 WH Cases 416 (1960).

> "[T]he value of such an [employee's efforts in filing a complaint] may pale when set against the prospect of discharge and the total loss of wages for the indeterminate period necessary to seek and obtain reinstatement. Resort to statutory remedies might thus often take on the character of a calculated risk, with restitution of partial deficiencies in wages due for past work perhaps obtainable only at the cost of irremediable entire loss of pay for an unpredictable period. Faced with such alternatives, employees understandably might decide that matters had best be left as they are. We cannot read the Act as presenting those it sought to protect with what is little more than a Hobson's choice." Accord, NLRB v. Schill Steel Products, Inc., 480 F.2d 586, 594, 83 LRRM 2386, 2669 (5th Cir. 1973); NLRB v. J. P. Stevens and Co., 464 F.2d 1326, 1348, 80 LRRM 3126 (2d Cir. 1972); cert. denied, 410 U.S. 926, 82 LRRM 2597.

11. This Court concludes that defendants' retaliatory conduct has had and will continue to have, unless enjoined, a chilling effect on other employees who have already sought to avail themselves, or in the future might seek to avail themselves, of rights guaranteed by Title VII. Unless defendants are enjoined from engaging in such retaliatory acts, the employees bringing the charges now pending against defendant USF&G will be reluctant to participate in the administrative and judicial processing of their charges and other employees who are aggrieved will be discouraged from exercising their Title VII rights.

12. Defendant USF&G's retaliatory conduct has undermined and inhibited plaintiff EEOC's ability to discharge its statutory duties and responsibilities of eliminating employment discrimination made unlawful by Title VII. (Certification of David W. Zugschwerdt). The public interest, as expressed in Title VII, is in the free and uninhibited exercise of civil rights guaranteed and protected by that Act and in the effective performance by the EEOC of its duties under the law.

Appropriate Remedies

13. Section 706(g) of Title VII which outlines the scope of the court's remedial powers, reads in relevant part as follows:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate . . .

In its consideration of Title VII cases, the Supreme Court has consistently held that "the scope of a district court's remedial powers under Title VII is determined by the purposes of the Act." Teamsters (T.I.M.E. — D.C.) v. United States, 431 U.S. 324, 97 S.Ct. 1843, 14 FEP Cases 1514. One of the Act's purposes is "to make

persons whole for injuries suffered on account of unlawful employment discrimination." T.I.M.E. — D.C., 97 S.Ct. at 1869; citing Albemarle Paper Co. v. Moody, 422 U.S. 405, at 418, 10 FEP Cases 1181. In determining the specific remedies to be applied, a district court is "to fashion such relief as the particular circumstances of a case may require to effect restitution." T.I.M.E. — D.C., 97 S.Ct. at 1869, citing Franks v. Bowman, 424 U.S. 747, at 764, 12 FEP Cases 549. The Supreme Court has further held that Congress vested the district courts with broad equitable powers in Title VII cases, "to make possible the 'fashioning of the most complete relief possible,'" and that the district courts have " 'not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.' " T.I.M.E. — D.C., 97 S.Ct. at 1869, citing Albemarle, 422 U.S. at 421, 418.[7]

14. *Reinstatement.* This relief is expressly provided for in the Section 706(g).

[5] Reinstatement is uniquely appropriate remedy for this retaliatory discharge as it restores the status quo prior to the Company's illegal action, places plaintiff Mead in the position she was in and would be

[7] In analyzing the remedial provisions of Title VII, the Supreme Court has relied on the Conference Committee Report which analyzed the 1972 amendments to Title VII and reaffirmed the remedial goals of § 706(g):

> The provisions of this subsection are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. In dealing with the present section 706(g) the courts have stressed that the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination. 118 Cong. Rec. 7168 (1972). Id. at 421.

in but for the unlawful retaliation, and concretely establishes that plaintiff Mead has rights under Title VII. It will help to reduce the chilling effect and fear that the retaliatory discharge of Ms. Mead has engendered in both Ms. Mead and other employees.

The fact that Ms. Mead was able to secure other employment following her discharge from USF&G does not alter her right to be offered reinstatement, but is relevant only to the amount of backpay due her. This is particularly true in these circumstances where the discharge has infringed on Ms. Mead's federally protected rights and interfered with the administrative processes established by Title VII. As the plaintiffs have contended in this case, one of the central purposes of §704(a) is to preserve free and uninhibited access to the EEOC. To limit Ms. Mead's remedies to monetary reimbursement would be to thwart one of the central purposes of §704(a), a result which is totally unwarranted by the facts of this case.

The Supreme Court came to the same conclusion over 25 years ago when it discussed the propriety of reinstatement under the National Labor Relations Act for an employee who had obtained interim employment following his unlawful discriminatory discharge by a company:

> To be sure, reinstatement is not needed to repair the economic loss of a worker who, after discrimination, has obtained an equally profitable job. But to limit the significance of discrimination merely to questions of monetary loss to workers would thwart the central purpose of the [National Labor Relations] Act, directed as that is toward the achievement and maintenance of workers' self-organization. That there are factors other than loss of wages to a particular worker to be considered is suggested even by a meager knowledge of industrial affairs. Thus, to give only one illustration, if men were discharged who were leading efforts at organization in a plant having a low wage scale, they would not unnaturally be compelled by their economic circumstances to seek and obtain employ-

ment elsewhere at equivalent wages. In such a situation, to deny the Board power to wipe out the prior discrimination by ordering the employment of such workers would sanction a most effective way of defeating the right of self-organization. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 193, 8 LRRM 439 (1941).[8]

15. *Backpay.* The Supreme Court has ruled that, absent extraordinary circumstances, backpay must be awarded victims of discrimination violative of Title VII. Albemarle Paper Co. v. Moody, supra, 422 U.S. at 419-422. The Court of Appeals for the Eighth Circuit has explained the significance of this remedy: "It is the reasonably certain prospect of a backpay award that 'provide[s] the spur of catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.' U.S. v. N.L. Industries, Inc., 479 F.2d 354, 379, 5 FEP Cases 823 (8th Cir. 1973)."

[6] The backpay award should include all raises, bonuses, and other fringe benefits which Ms. Mead would have received absent her illegal discharge. Any interim earnings should be deducted from the total figure. 42 U.S.C. §2000e-5(g). Furthermore, since the Company's unlawful conduct has created the necessity for this backpay judgment, any "uncertainties in determining what an employee would have earned but for the discrimination, should be resolved against the discriminating [party]." Hairston v. McLean Trucking Co., 520 F.2d 226, 233, 11 FEP Cases 91 (4th Cir. 1975); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 260-261, 7 FEP Cases 1115 (5th Cir. 1974).

The parties have stipulated that plaintiff Mead suffered a loss of $1,619.11 during the period from

[8] The Supreme Court has repeatedly cited Phelps Dodge as authority for construing Section 706(g) of Title VII. See, e.g., Franks v. Bowman, 424 U.S. at 769; Albermarle Paper Co. v. Moody, 422 U.S. at 419.

January 7, 1977, through August 1, 1977 as a result of net loss of pay, uncompensated regular work, uncompensated overtime, transportation expenses, unreimbursed medical expenses, and excess automobile insurance premiums. The parties further stipulated "that in the event the Court orders defendants to offer plaintiff Mead reinstatement and such offer is refused, additional backpay relief including loss of pay, vacation pay, pension benefits, termination pay and other fringe benefits may be awarded." The Court approves of the Stipulation.

[7] 16. *Permanent Injunction.* Section 706(g) specifically gives the court the authority to "enjoin the respondent from engaging in [an] unlawful employment practice." The permanent injunction requested here imposes no undue hardship of the defendants for it simply obligates them to comply with Title VII's mandate to refrain from discriminating or interfering with any employee or applicant because that person exercised his or her Title VII rights. In light of the intimidation and harassment of plaintiff as well as others, the record amply demonstrates that the protection of this Court is necessary to safeguard the civil rights of those employees and applicants. Cf., U.S. v. N.L. Industries, 479 F.2d 354, 375, 5 FEP Cases 823 (8th Cir. 1973). Furthermore, a permanent injunction serves to protect public interest in free and uninhibited access to the EEOC, the federal agency responsible for enforcing Title VII.

Such injunctions, in the form of cease and desist orders are routinely entered upon proof of a retaliatory discharge in violation of the National Labor Relations Act. For instance, NLRB v. Scrivener, 405 U.S. 117, 79 LRRM 2587 (1972) involved a closely analogous fact situation in that an employee was discharged for exercising protected statutory rights of invoking access to a government agency. The remedy for that violation was a routine cease and desist order which the Court of Appeals for the Eighth Circuit enforced without comment. 80 LRRM 3005 (8th Cir. 1972).

Such injunctions are becoming common in Title VII cases. Two of the Title VII cases on record involve facts very similar to the ones at hand. In those cases the defendants were enjoined from engaging in practices which would have the effect of precluding or discouraging persons similarly situated to the plaintiffs from exercising their rights under Title VII, EEOC v. Union Bank of Arizona, 12 FEP Cases 527, 530 (D.C.Ariz. 1976); EEOC v. Midas, Inc., 8 FEP Cases 719, 721 (1974). See Willie Wells et al. v. Meyer's Bakery, 561 F.2d 1268, 14 EPD ¶7651, 15 FEP Cases 930 (8th Cir. 1977); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 7 FEP Cases 1115 (5th Cir. 1974).

Based upon the record in this case, the plaintiffs are entitled to a permanent injunction restraining defendants at the Minneapolis office of USF&G from engaging in any like or related retaliatory actions to those taken against Ms. Mead, including retaliatory discharge and retaliatory and selective surveillance and monitoring, and any other activities which violate § 704(a).

17. *Communication of this Court's Order.* Credible employee testimony as well as the fact of Mead's discharge have established the chilling effect created solely by the illegal conduct of the Company on the exercise of employee Title VII rights. One of the most effective means of curbing that effect is to require the cause of the intimidation — the Company — to announce its cessation of its own illegal conduct. Employer communication of court directions to cease and desist from unlawful employment practices is a well used and effective remedy in labor law.[9]

[9] See, e.g., NLRB v. Express Publishing Co., 312 U.S. 426, 438 9, 8 LRRM 415 (1941); Marine Welding & Repair Works v. NLRB 439 F.2d 395, 399, 76 LRRM 2660 (8th Cir. 1971); NLRB v. Teamsters, Local 294, 470 F.2d 57, 63, 81 LRRM 2920 (2nd Cir. 1972); cert. denied, 393 U.S. 836; J. P. Stevens & Co. v. NLRB 461 F.2d 490, 495, 80 LRRM 2609 (4th Cir. 1972); Texas Gulf Sulphur Co. v. NLRB 463 F.2d 778, 779, 80 LRRM 3171 (5th Cir. 1972).

This remedy has begun to be employed by district courts in Title VII cases. One district court ordered an employer that had unlawfully retaliated against two employees for filing a charge with the EEOC or for assisting persons who had done so to deliver to each of its employees a copy of the court's findings of fact, conclusions of law and order. EEOC v. Union Bank of Arizona, 12 FEP Cases, at 529. In the case of EEOC v. Midas, Inc., 8 FEP Cases 719, a company was required to communicate to each employee both orally and by written statement the court's preliminary order reinstating retaliatorily discharge employees and enjoining further acts by the company.

[8] Therefore, because the circumstances of this case warrant it, this Court will order that the defendant USF&G deliver a copy of this Order to each employee employed at the Minneapolis office at any time since May 5, 1976 and post a copy of the order at a conspicuous place on the working premises of the Minneapolis office for 60 days. This Court will further order that the highest ranking official in the Minneapolis office of USF&G read both this Order and § 704(a), 42 U.S.C. § 2000e-3(a) during working hours at a meeting attended by all employees, supervisors and other management officials employed at defendant USF&G's Minneapolis office within ten (10) days of the signing date of this Order and that for the purpose of this meeting Sheila Mead shall be considered an employee and may be present, at her discretion.

[9] 18. *Expungement.* The personnel records of Ms. Mead and any related records should be expunged of all adverse comments communicated since May 5, 1976. Expungement is necessary both to eliminate the discriminatory effects of past retaliation and to preclude any future discriminatory effects on Ms. Mead of USF&G's past acts of retaliation.

Following an appropriate motion and hearing, the Court will determine plaintiff's entitlement to costs and a reasonable attorney's fee.

ORDER FOR PLAINTIFF MEAD'S § 704(a) RETALIATORY DISCHARGE CLAIM

Before the Court is the complaint of plaintiff Sheila Mead and the plaintiff-intervenor Equal Employment Opportunity Commission that defendant United States Fidelity and Guaranty Company learned in May, 1976, that Ms. Mead had filed charges with the EEOC alleging that USF&G unlawfully discriminated against her on the basis of sex, and that thereafter, in retaliation for filing those sex discrimination charges, the defendant USF&G through its agents took reprisals against Ms. Mead by, among other activities, monitoring her work with greater frequency than that of other similarly situated employees, making unsupported adverse reviews of her work and discharging her. This matter has been heard by this Court and Findings of Fact and Conclusions of Law have been drawn, resulting in the conclusion that the defendant USF&G did retaliate against plaintiff Sheila Mead and discharge her in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) et seq. because she had filed charges alleging that USF&G discriminates on the basis of sex with the EEOC.

Therefore, in accordance with those Findings of Fact and Conclusions of Law, the following relief is ORDERED:

A. that defendant United States Fidelity and Guaranty Company, its officers, agents, employees, and all persons in active concert or participation with it are hereby permanently enjoined from engaging in any retaliatory actions in violation of Section 704(a) against plaintiff Sheila Mead or any other employees at its Minneapolis, Minnesota branch office for opposing practices made unlawful under Title VII or for filing charges, testifying, assisting or participating in an investigation or other proceeding under Title VII.

B. that defendant USF&G offer plaintiff Sheila Mead reinstatement to the position of Assistant Underwriter A in the Fire Department, restoring to her

all rights and benefits she would have received if she had not been unlawfully discharged, including, but not limited to insurance and pension programs, as well as other compensation, terms, conditions and privileges of employment. Ms. Mead shall be allowed a reasonable time in which to respond to the offer of reinstatement.

C. that defendant USF&G pay to Ms. Sheila Mead the backpay due her from January 7, 1977, to August 1, 1977, amounting to $1,619.11, plus interest, at the rate of 6% per annum, and that defendant USF&G remedy all monetary and other losses caused by the unlawful termination of her employment.

[10] D. that defendant USF&G transfer to Ms. Sheila Mead the bracelet which is given to employees who have been employed by USF&G for five years, which Ms. Mead would have received if she had not been unlawfully terminated.

E. that defendant USF&G take all actions necessary to place Ms. Mead in the position she would have been in had she not been unlawfully discharged, including the expungement from her personnel records and any other related records maintained or controlled by defendant USF&G all adverse comments communicated or recorded since May 5, 1976. The expungement shall be stayed pending the completion of the litigation presently before this Court, including the resolution of charges other than the § 704(a) retaliatory discharge claim. Nevertheless, in any circumstances other than those involving the litigation, information shall be conveyed as if the expungement order had been completely effectuated.

F. that defendant USF&G, through its managing officer of the Minneapolis, Minnesota branch office, deliver to each employee employed in its Minneapolis office at any time since May 5, 1976, a copy of this Order within ten days of the filing date of this Order.

G. that the highest ranking official in the Minneapolis office of USF&G shall read this Order and

§ 704(a), 42 U.S.C. § 2000e-3(a) during working hours at a meeting attended by all employees, supervisors and other management officials employed at defendant USF&G's Minneapolis office within ten (10) days of the signing date of this Order and that for the purpose of this meeting Sheila Mead shall be considered an employee and may be present, at her discretion.

H. that defendant USF&G post in a conspicuous place in its Minneapolis office for a period of at least 60 days a copy of this Order with a Notice attached signed by a responsible officer of defendant USF&G advising employees of this Order and of the existence of the permanent injunction and directive that the Company is under this Court's Order to refrain from taking any retaliatory action against any employee who exercises his or her rights under Title VII.

Let judgment be entered accordingly.

IT IS SO ORDERED.

ORDER

Before the Court are plaintiff Sheila Mead's Motion for Temporary and Preliminary Relief and plaintiff-intervenor Equal Employment Opportunity Commission's Petition for Temporary Relief on plaintiff Mead's § 704(a) retaliatory discharge claim. Because permanent relief has been granted on the merits of plaintiff Mead's § 704(a) action, the Motion and Petition are hereby denied.

IT IS SO ORDERED.

MEAD v. U.S. FIDELITY & GUARANTY CO.

U.S. District Court, District of Minnesota

MEAD, et al., and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Intervenor v. UNITED STATES FIDELITY AND GUARANTY COMPANY, et al., No. 4-77-16, January 13, 1978

Action under Title VII of Civil Rights Act of 1964 by former employees against employer, wherein former employees moved for class certification. Class certified.

See also 18 FEP Cases 131, 442 F. Supp. 102; 18 FEP Cases 136, 442 F. Supp. 109; and 18 FEP Cases 140, 442 F. Supp. 114.

Frank Vogl and Thomas D. Carlson (Best & Flanagan), Minneapolis, Minn., for plaintiffs.

Katherine S. McGovern, Washington, D.C., for intervenor.

Stuart W. Rider, Jr., and Timothy R. Thornton (Rider, Bennett, Egan, Johnson & Arundel), Minneapolis, Minn., and Arthur M. Brewer (Shawe & Rosenthal), Baltimore, Md., for defendants.

Full Text of Opinion

LORD, District Judge: —

Memorandum Accompanying Order Certifying Case as Class Action

Plaintiffs Sheila Mead and Terry Oakley filed a motion, pursuant to Fed. R. Civ. P. 23, to have the class certified for the instant action. The Equal Employment Opportunity Commission supported plaintiffs' motion for class certification under Fed. R. Civ. P. 23(b). The defendants filed a memorandum of law opposing the motion.

Subsequent to a full hearing, the Court ordered that this case be maintained as a class action under Fed. R. Civ. P. 23(b)(2), and the plaintiffs were designated representatives of a class comprised of all past, present, and future women employed by defendant United

States Fidelity and Guaranty Company at any of its offices in the United States Fidelity and Guaranty Company at any of its offices in the United States since July 5, 1965, and all past, present, and future female applicants for employment with defendant United States Fidelity and Guaranty at any of its offices in the United States since July 5, 1965. This memorandum will set forth the factual and legal basis for the November 22, 1977 Order certifying the class.

I. Statement of Facts

Pursuant to the provisions of Title VII of the Civil Rights Act of 1964, this action was commenced by Sheila Mead and Terry Oakley against their employer, defendant United States Fidelity and Guaranty Company. The essential thrust of plaintiffs' complaint is that defendant USF&G has engaged and continues to engage in a pattern and practice of discriminating in employment against women.

Defendant USF&G is headquartered in Baltimore, Maryland and has fifty-eight branch offices located in thirty-eight states. Although each office varies in number of persons employed, the average size of each branch office is eighty to one hundred employees. In total, USF&G employs over 7,500 people of whom over 4,500 are women. For all of the time relevant thereto, USF&G's total work force has been 58% or greater female. USF&G has centralized and uniform personnel policies as evidenced by the Supervisors Guide which was referred to during the course of the Mead retaliatory discharge trial. Throughout all of its offices, defendant uses the same personnel standards and forms and applies uniform personnel policies throughout its entire organization. USF&G has developed and utilized in its employment policies and practices a written job description which identifies the basic qualifications and grade for each job at USF&G.

Defendant USF&G is required, pursuant to Section 709(c) of Title VII, to file annually EEO-1 reports which show the relationship of minority and female employees

to its total work force in specified job categories. Plaintiffs' counsel has consolidated defendant's EEO-1 reports for all of its offices for the year 1971 through 1975, revealing the following statistics:

Year	Total Employees	Men	Women	Male Profs.[1]	Female Profs.[1]	Male Clericals[2]	Female Clericals[2]
1971	7111	2944 (41.4%)	4167 (58.6%)	2724 (93.4%)	192 (6.6%)	220 (5.2%)	3975 (94.8%)
1972	7275	3018 (41.5%)	4257 (58.5%)	2762 (91.7%)	251 (8.3%)	256 (6.0%)	4006 (94.0%)
1973	7347	2973 (40.5%)	4374 (59.5%)	2790 (89.4%)	332 (10.6%)	183 (4.3%)	4042 (95.7%)
1974	7541	3010 (41.0%)	4531 (60.0%)	2800 (87.0%)	416 (13.0%)	213 (4.0%)	4115 (95.0%)
1975	7510	2967 (39.5%)	4543 (60.5%)	2762 (85.1%)	485 (14.9%)	205 (4.8%)	4058 (95.2%)

Source: EEO-1 Reports, 1971, 1972, 1973, 1974, 1975 Filed by USF&G for its consolidated workforce

Comparing only 1975, the most recent EEO-1 reports filed by defendant for the headquarters and each of the 58 branch offices with the relevant civilian labor force for that area, the following statistics are revealed:

[1] The term "professional" refers to professional, technical, managerial, supervisory and like positions and includes, among others, such positions as underwriter, outside adjuster, assistant supervisor; supervisor and manager.

[2] The term "clerical" refers to clerical, secretarial, stenographic and like positions and includes, among others, such positions as clerk (mail, records, messenger and code), typists, secretaries, bookkeepers and assistant underwriters.

Branch Office	Total Employees	Male Managers	Female Managers	Relevant Civilian Labor Force Men	Women
Albuquerque	(59)	23 (92.0%)	2 (8%)	61.5%	38.5%
Atlanta	(105)	40 (100%)	0 (0%)	59.4%	40.6%
Baltimore	(87)	31 (88.6%)	4 (11.4%)	61.1%	38.9%
Baltimore Hdq.	(1463)	400 (75%)	128 (25%)	61.1%	38.9%
Birmingham	(129)	43 (84.3%)	8 (15.7%)	62.1%	37.9%
Boston	(96)	44 (100%)	0 (0%)	59.0%	41.0%
Buffalo	(53)	19 (82.6%)	4 (17.4%)	62.9%	39.1%
Charleston	(60)	29 (87.9%)	4 (12.1%)	64.8%	35.2%
Charlotte	(59)	24 (96%)	1 (4%)	58.6%	41.4%
Chicago	(245)	86 (81.9%)	19 (18.1%)	61.2%	38.8%
Cincinnati	(62)	22 (84.6%)	4 (15.4%)	62.5%	35.5%
Cleveland	(55)	22 (88%)	3 (12%)	62.4%	37.6%
Columbia, SC	(81)	33 (91.6%)	3 (8.4%)	58.2%	41.8%
Columbus, OH	(45)	22 (88%)	3 (12%)	59.8%	40.2%
Dallas	(119)	37 (75.5%)	12 (24.5%)	59.7%	40.3%
Denver	(126)	47 (83.9%)	9 (16.1%)	60.6%	39.4%
Des Moines	(51)	20 (95.2%)	1 (4.8%)	58.9%	41.1%
Detroit	(86)	29 (74.4%)	10 (25.6%)	64.4%	35.6%
Dixon, IL	(44)	18 (94.7%)	1 (5.3%)	47.8%	52.2%
Harrisburg. PA	(48)	45 (93.8%)	3 (6.3%)	60.4%	39.6%
Hartford, CT	(86)	31 (91.2%)	3 (8.8%)	60.3%	39.7%
Helena, MT	(39)	14 (87.5%)	2 (12.5%)	55.5%	44.5%
Houston, TX	(67)	26 (86.6%)	4 (13.4%)	63.7%	36.3%
Indianapolis, IN	(185)	54 (79.4%)	14 (20.6%)	61.1%	38.9%
Jackson, MS	(28)	17 (94.5%)	1 (5.6%)	57.7%	42.3%
Jacksonville, FL	(122)	34 (79.1%)	9 (20.9%)	58.9%	41.1%
Kansas City, MO	(90)	39 (90.7%)	4 (9.3%)	60.0%	40.0%
Lansing, MI	(63)	24 (88.9%)	3 (11.1%)	61.5%	38.5%
Little Rock, AR	(73)	30 (90.9%)	3 (9.1%)	58.8%	41.2%
Los Angeles, CA	(110)	37 (82.2%)	8 (17.7%)	61.0%	39.0%
Louisville, KY	(72)	30 (90.9%)	3 (9.1%)	61.6%	38.4%
Memphis, TN	(84)	32 (84.2%)	6 (15.8%)	60.6%	39.4%
Miami, FL	(95)	34 (75.6%)	11 (24.4%)	58.4%	41.6%
Oklahoma City	(122)	52 (95.4%)	3 (5.5%)	59.9%	40.1%
Milwaukee, WI	(82)	30 (81.1%)	7 (18.9%)	61.0%	39.0%
Minneapolis, MN	(98)	40 (83.3%)	8 (16.7%)	59.6%	40.4%
Nashville, TN	(111)	41 (78.8%)	11 (21.1%)	59.4%	40.6%
New Orleans, LA	(118)	44 (93.7%)	3 (6.4%)	62.6%	37.4%
New York City	(213)	86 (82.7%)	18 (17.3%)	60.7%	39.3%
Omaha	(53)	26 (96.3%)	1 (3.7%)	60.0%	40.0%
Philadelphia	(87)	36 (94.7%)	2 (5.3%)	61.8%	38.2%
Phoenix	(69)	27 (91.8%)	6 (18.2%)	61.3%	38.7%
Pittsburgh	(70)	28 (87.5%)	4 (12.5%)	65.7%	34.3%
Portland, ME	(63)	24 (80%)	6 (20%)	58.9%	41.1%
Portland, OR	(57)	22 (88%)	3 (12%)	61.0%	39.0%

Branch Office	Total Employees	Male Managers	Female Managers	Relevant Civilian Labor Force Men	Women
Raleigh	(98)	31 (77.5%)	9 (22.5%)	58.0%	42.0%
Richmond	(111)	36 (87.8%)	5 (12.2%)	58.3%	41.7%
Sacramento	(90)	32 (91.4%)	3 (8.6%)	61.3%	38.7%
Salt Lake City	(57)	28 (96.6%)	1 (3.4%)	63.0%	37.0%
San Antonio	(53)	15 (68.2%)	7 (31.8%)	60.4%	39.6%
San Francisco	(84)	29 (76.3%)	9 (23.7%)	60.6%	39.4%
San Jose	(58)	22 (84.6%)	4 (15.4%)	63.1%	36.9%
Scranton	(56)	23 (88.5%)	3 (11.5%)	59.8%	40.2%
Seattle	(54)	20 (74.1%)	7 (25.9%)	62.5%	37.5%
Springfield, MA	(100)	35 (85.4%)	6 (14.6%)	59.4%	40.6%
Syracuse	(85)	29 (85.3%)	5 (14.7%)	61.6%	38.4%
St. Louis	(118)	43 (71.7%)	17 (28.3%)	61.4%	38.6%
Toledo	(45)	19 (86.4%)	3 (13.6%)	63.4%	36.6%
Wichita	(65)	25 (92.6%)	2 (7.4%)	61.8%	38.2%

Source: EEO-1 Reports, 1975 Filed by USF&G for its consolidated workforce

On March 27, 1972, plaintiff Mead commenced employment as a multi-line rate clerk/typist in the Fire and Marine Department of the Minneapolis office of defendant USF&G. In August, 1974, following graduation from Hamline University, plaintiff Terry Oakley commenced employment as a rate clerk in the Fire and Marine Department of the Minneapolis office of defendant USF&G (Tr. 1314-15).[3] During the course of her employment, she took courses in insurance at the University of Minnesota (Tr. 1315). In May and July, 1976 Mead and Oakley filed on behalf of themselves as well as all other female employees and female applicants for employment "across the board" sex discrimination charges with the Equal Employment Opportunity Commission ("EEOC") against defendant USF&G.

Mead worked for defendant until January 7, 1977 when she was unlawfully discharged for having exercised her protected rights under Title VII. (See, this Court's Findings of Fact, Conclusions of Law, Order for Judgment On Plaintiff Mead's 704(a) Retaliatory

[3] References are to exhibits and transcripts of the trial before this Court on the retaliatory discharge claim of Plaintiff Mead. That matter is Claim II of the Amended Complaint.

Discharge Claim dated September 14, 1977 hereinafter cited as "Findings"). Oakley worked for defendant USF&G until April 28, 1977 when she was constructively discharged in retaliation for having filed EEO charges (Tr. 1315-1317).

In addition to the Mead and Oakley charges, substantially identical "across the board" sex discrimination charges against defendant USF&G have been filed by Amy Quinn Lavoie (Tr. 768), Leslie Deaton (Tr. 721), and Lynn Silbernagel. Sex discrimination charges against defendant USF&G have also been raised with the EEOC by women employees in Baltimore, Des Moines, St. Louis, and Oklahoma City. See, EEOC v. USF&G, Civ. Nos. HM 75-1712, 75-1812-1815, 15 FEP Cases 532 (D.Md. 1976). Furthermore, in 1974, a Commissioner's § 707 charge alleging, among other things, a pattern and practice of sex discrimination was filed against USF&G.

On May 23, 1977, the EEOC filed a Motion for Leave to Intervene as a party plaintiff in the class action of Mead and Oakley. At that same time the EEOC filed a Complaint in Intervention "quite similar to" the "across the board" sex discrimination allegations in the Mead-Oakley Complaint (Court's Memorandum and Order on Intervention dated August 15, 1977 at p. 6). Attached to the Commission's Complaint in Intervention is the Certificate of its General Counsel EEOC certifying that "the Commission has determined this action to be of general public importance in accordance with Section 706(f)(1) of Title VII. . . ."

On August 15, this Court ordered the parties to engage in conciliation and "if no settlement is forthcoming by the end of the sixty day period, this Court will enter an order permitting the EEOC to expand its intervention in accordance with its Complaint in Intervention." Memorandum and Order on Jurisdiction at p. 8.[4] The parties subsequently engaged in conciliation efforts, which terminated on November 18, 1977 without settlement. On November 22, the Order certifying the case as a class action was filed. Intervention was granted on December 20, 1977.

[4] The Court reserved ruling on whether the EEOC could expand its intervention beyond its Complaint in Intervention to include other matters raised in the § 707 Commissioner's charge.

Fed. R. Civ. P. 23(a) establishes these prerequisites to maintenance of a class action:

> (1) the class is so numerous that joinder of all members is impracticable.
>
> (2) there are questions of law or fact common to the class,
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

In addition to the above, one of the three alternative requirements of Fed. R. Civ. P. 23(b) must be met. Sperry Rand Corp. v. Larson 554 F.2d 868, 874-875, 14 FEP Cases 1455, 1459 (8th Cir. 1977). The present case pleads a civil rights action brought pursuant to Title VII of the Civil Rights Act of 1964 USC §2000e et seq., which seeks, among other things, declaratory and injunctive relief for the named plaintiffs as well as all women who have been, are being, or will in the future be discriminated against by defendant USF&G. This case falls squarely within subdivision (b)(2) of Rule 23 which provides:

> (b) *Class Action Maintainable.* An Action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition;
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the class as a whole.

II. The Complaint Meets the Requirements of Rule 23(a)(1).

The Rule 23(a)(1) requirement that "the class be so numerous that joinder of all members is impracticable" is plainly met here. Plaintiffs seek to represent all past,

present and future women employed by defendant USF&G at any of its offices in the United States since July 5, 1965.

[1] The statistics set forth on pages 3 and 4 illustrate that over 4,500 women have a potential Title VII cause of action against common defendant.[5] These women are located in 38 different states. These undeniable facts alone establish the impossibility of joinder of all the parties. Bearing in mind that the courts have held that the Rule requires only *impracticability*, not impossibility, Jensen v. Continental Financial Corporation, 404 F.Supp. 806, 809 (D. Minn., 1975); the standard is obviously met.

In similar cases, class actions have been declared with far fewer class plaintiffs. See, e.g., Griggs v. Duke Power Co., 401 U.S. 424, 3 FEP Cases 175 (1971) (a class of 95 employees) Horn v. Associated Wholesale Grocers, 555 F.2d 270, 275-276, 14 FEP Cases 1460, 1464-1465 (10th Cir. 1977) (41 persons); Arkansas Teachers Association v. Board of Education, 446 F.2d 763, 3 FEP Cases 800 (8th Cir. 1971) (20 persons); Cypress v. Newport News General, 375 F.2d 648, 9 FEP Cases 1065 (4th Cir. 1967) (18 persons).

[2] Further, in light of the illegal retaliatory discharge of class representative Mead here, a class action is uniquely appropriate to the present circumstances due to the job jeopardy otherwise risked by an individual seeking relief. The Tenth Circuit recognized this fact in Horn v. Associated Wholesale Grocers, supra, 555 F.2d at 275, 14 FEP Cases at 1464-1465, when it explained:

> "[E]mployees are apprehensive concerning loss of jobs and the welfare of their families. They are frequently unwilling to pioneer an undertaking of this kind (a class action Title VII suit) since they are unsure as to whether the court will support them. Even if they do prevail, they are apprehensive about offending the employer as a result of taking a stand. These are all factors that enter into the impracticability issue."

[5] In addition, there are numerous but uncounted former employees and applicants.

Additionally, the formation of a nationwide class insures that the Court will be able to grant effective relief, should such be warranted, which cannot be thwarted by the inter-office transfer of employees.

III. The Complaint Meets the Requirements of Rule 23(a)(2)

[3] The Rule 23(a)(2) requirement that there be "questions of law or fact common to the class" is obviously present here.[6] The basic legal and factual allegation in the Complaint — which applies "across the board" to all members of plaintiffs' class — is that defendant USF&G has intentionally denied equal employment opportunity to women applying to and employed by it throughout the United States. The validity of this "across the board" approach has been recognized by the courts. See, e.g., Senter v. General Motors Corp., 532 F.2d 511, 12 FEP Cases 451 (6th Cir. 1976); Rich v. Martin Marietta Corp., 522 F.2d 333, 11 FEP Cases 211 (10th Cir. 1975); Johnson v. Georgia Highway Express, 417 F.2d 1122, 1124, 2 FEP Cases 231 (5th Cir. 1969); Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 2 FEP Cases 223 (7th Cir. 1969); Jenkins v. United Gas Corp., 400 F.2d 28, 33, 1 FEP Cases 364, 69 LRRM 2152 (5th Cir. 1968). See also 3B *Moore's Federal Practice* Para. 23.06-1 at P. 23-303, n. 7 and Supplement; *Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1220 (1971).

[6] Professor Moore has characterized this requirement as "unnecessary, since, in addition to the prerequisites of subdivision (a), an action can be maintained as a class action under Rule 23 only if it satisfies the requirements of at least one of the three types of class actions provided by subdivision (b)." The existence of common questions is implicit in each of those three types. 3B Moore's Federal Practice Para. 23.06-1 at P. 23-301.

Common questions of law and fact concerning the nature of defendant's practices which affect these class members and which raise issue under Title VII are set out in the Complaint of Mead and Oakley and the Complaint in Intervention of EEOC. These include such questions as:

(a) Whether defendant USF&G has and continues to maintain recruitment and hiring policies and practices with respect to professional trainee, professional, technical and managerial positions which unlawfully operate to deny potential female applicants, female applicants, current female employees, and past female employees equal employment opportunity because of their sex (Mead-Oakley Amended Complaint at para-Oakley Amended Complaint at paragraph 6 and 8; EEOC Complaint at paragraph 9a).

(b) Whether defendant USF&G has and continues to maintain policies and practices with respect to assignment, selection, training and testing which unlawfully operate to deny potential female employees, current female employees, and past female employees equal employment opportunity because of their sex (Mead-Oakley Amended Complaint at paragraph 7, 9 and 10; EEOC Complaint at paragraph 96).

(c) Whether defendant USF&G has and continues to maintain policies and practices with respect to promotion and transfer which unlawfully operate to deny potential female employees, current female employees, and past female employees equal employment opportunity because of their sex (Mead Oakley Amended Complaint at paragraphs 6 and 9; EEOC Complaint at paragraph 9c).

(d) Whether defendant USF&G has and continues to maintain policies and practices with respect to wages, internal employment opportunities, terms and conditions of employment, and privileges of employment which unlawfully operate to deny potential female employees, current female employees, and past female employees equal employment opportunity because of

their sex (Mead-Oakley Amended Complaint at paragraph 5; EEOC Complaint at paragraph 9d).

(e) Whether defendant USF&G has and continues to maintain policies and practices with respect to its benefits, including maternity, which unlawfully operate to deny potential female employees, current female employees and past female employees equal employment opportunity because of their sex (Mead-Oakley Amended Complaint at paragraph 5; EEOC Complaint at paragraph 9e).

(f) Whether defendant USF&G has and continues to maintain policies and practices with respect to training, promotion, assignments and transfer which operate unlawfully to deny past and present pregnant employees equal employment opportunity because of their sex (Mead-Oakley Amended Complaint at paragraph 11; EEOC Complaint at paragraph 9e).

These questions clearly show that there is a "common nucleus of operative facts" which affect all class members nation-wide, and accordingly clearly satisfies Rule 23(a)(2). Donaldson v. Pillsbury Co., 554 F.2d 825, 831 n.5, 14 FEP Cases 1111, 1117 (8th Cir. 1977); Veron J. Rockler and Co. v. Graphic Enterprises, Inc., 52 F.R.D. 335, 340 (D. Minn. 1971). Even if certain factual disparities existed within the class, the courts have uniformly held that such disparities are superceded by the alleged operation of a pervasive discriminatory employment policy. Thus the common nucleus need not embrace all of the operative facts. Johnson v. Georgia Highway Express, Inc., supra; Norwalk CORE v. Norwalk Development Agency, 395 F.2d 920 (2nd Cir. 1968). Cf., Reed v. Arlington Hotel Co., 476 F.2d 721, 5 FEP Cases 789 (8th Cir. 1973); Parham v. Southwestern Bell Telephone Co., 433 F.2d 421, 2 FEP Cases 1017 (8th Cir. 1970); Jensen v. Continental Financial Corporation, supra, 404 F.Supp. at 809-810.

IV. The Complaint Meets the Requirements of Rule 23(a)(3).

Rule 23(a)(3) provides that a class action may be maintained only if "the claims or defenses of the representative parties are typical of the claims or defenses of the class."

[4] Here the Complaint alleges that defendant has engaged in companywide employment practices which have had the effect of limiting job opportunities of women to low paying, undesirable positions and which discourage women from seeking employment opportunities with defendant. Statistical evidence vividly shows that defendant has consistently employed a disproportionate number of women in low-paying, undesirable positions. Among the discriminatory patterns alleged to have contributed to this condition are the following:

(a) The refusal and failure to recruit, hire, train or promote women to higher paying positions, particularly technical, professional, managerial and supervisory jobs.

(b) A job classification system which relegated women to clerical, secretarial and other non-professional, lower paying positions.

(c) A transfer system which freezes women into such non-professional, lower-paying positions.

(d) The denial to pregnant women of training, assignments or promotions and discouraging them from continuing employment following their pregnancy.

Plaintiff Mead was until January 7, 1977, an assistant underwriter. She repeatedly requested training, if needed, and promotion but was denied. When Mead was pregnant during the winter of 1975-76, defendant, through its agents, attempted to discourage her from continuing her employment. See, e.g., paragraphs 27-30 this Court's Findings of Fact, Conclusions

of Law, Order for Judgment on Plaintiff Mead's ¶704(a) Retaliatory Discharge Claim, dated September 14, 1977.

Plaintiff Oakley was, until April 28, 1977, employed as a rate clerk. She is a college graduate and took college courses in insurance in an effort to secure a better job with defendant. She repeatedly requested training, if needed, and promotion and was denied.

In short, the claims of plaintiff Mead and Oakley and the claims of the other class members emanate from the same legal theory — companywide practices which violate Title VII. Therefore, the claims of Mead and Oakley are not adverse, but rather are typical of the claims of the remaining class members, see, Jensen v. Continental Financial Corporation, supra, 404 F.2d at 811. As observed by the court in Leisner v. New York Telephone Co., 358 F.Supp. 359, 372, 5 FEP Cases 732, 743 (SD N.Y. 1973), in upholding a class consisting of named plaintiffs and all women employed in management level positions in the defendant's traffic departments throughout New York:

> "This prerequisite merely states in other words the requirements of R. 23 (a)(1), (a)(2), and (a)(4). See 3 B J. Moore, Federal Practice ¶23.06-1 (1971 Supp.). It does not mean that the claims of the representatives must raise identical questions of law and fact with those raised by the claims of the rest of the class. Rule 23 (a)(1) clearly indicates that one common question of law or fact can be sufficient if the other prerequisites are satisfied. Nor is it fatal if some members of the class might prefer not to have violations of their rights remedied. See Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920, 937 (2d Cir. 1968)."

The possible existence of individually distinct factual situations is unimportant for "Rule 23(a)(3) does not require that the claims of the representative parties and the remaining members of the class be identical." Byrnes v. IDS Realty Trust, 70 F.R.D. 608, (D. Minn. 1976). See also, Donaldson v. Pillsbury Co., supra 554 F.2d at 830, 14 FEP Cases at 1116. Accordingly, the requirements of Rule 23(a)(3) are met.

V. The Complaint Meets the Requirements of Rule 23(a)(4).

[5] Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." This requirement depends upon two factors: "(a) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to those of the class. Eisen v. Carlisle and Jacquelin, 391 F.2d 555, 562 (2d Cir. 1968)." Wetzel v. Liberty Mutual Insurance Co., 508 F.2d 239, 247, 9 FEP Cases 211, 216 (3rd Cir. 1975), cert. denied, 421 U.S. 972, 10 FEP Cases 1056. Accord, Jensen v. Continental Financial Corporation, supra, 404 F.2d at 811.

1. Plaintiffs' attorneys are qualified, experienced and able to conduct this litigation. As evidenced by their prompt efforts to attempt to secure immediate injunctive relief prohibiting retaliation against plaintiff Mead and by their successful effort to secure permanent injunctive relief prohibiting retaliation against Mead or any other Minneapolis employee for exercising their Title VII rights, Counsel has vigorously pursued this matter to date and will continue to pursue this litigation to its conclusion. Jensen v. Continental Financial Corporation, supra, 404 F.Supp. at 812.[7]

The Court has granted the Petition In Intervention of the Equal Employment Opportunity Commission. Thus, the interests of the class will be protected not only by able counsel for the plaintiff, but also by the resources of the Equal Employment Opportunity Commission.

2. The interests of the present plaintiffs clearly are not antagonistic to the class. As demonstrated by the now concluded 14 days of trial, the present plaintiffs stand willing to sacrifice their own time, effort and personal reputations to pursue the Title VII rights of all women with respect to the defendant USF&G. In an

[7] Having the resources, experience and tenacity it does, intervening-plaintiff EEOC obviously meets this criterion. Intervening-plaintiff EEOC supports this motion.

attempt to set the present plaintiffs apart from other female employees of the defendant, it may allude to alleged personality conflicts previously suggested at trial. While such charges would be both unfounded and without merit they do not address the determinative question of whether differences exist over the subject matter of the lawsuit. The present plaintiff's prayer for relief is common to all females within or without the defendant organization, and as such is not antagonistic or contrary to the interests of any individual woman, regardless of her relationship to USF&G or the present plaintiffs.

In Sperry Rand v. Larson, supra, 554 F.2d at 873-874, 14 FEP Cases at 1458-1459, the Eighth Circuit *rejected* a claim that the plaintiff in a Title VII class action had interests antagonistic to the class members. There, the defendants (the employer, the Local Union and its International Union) claimed that plaintiffs, as past union officials, engaged in activities in and out of office that were inconsistent with the interests of the class.[8] The Court concluded that the frictions did not reach the subject matter of the suit, that the plaintiffs' past history as union officials would not preclude vigorous prosecutions of the claims of class-based discrimination, that the evidence of lack of enthusiasm by other

[8] Five alleged sources of antagonism between the representatives and the class were:

1) Intra-union disputes which occurred from 1968-1970 while plaintiffs were union officers:
2) Plaintiffs, as former union officers, might be called as witnesses to defend the Local against charges that it is liable for discriminatory practices that occurred during the time they were in office;
3) Plaintiffs were suspended from office in 1970 by the defendant International and prohibited from holding office for five years, thus suggesting an ulterior motive for the Title VII suits;
4) The class did not support the suit as evidenced by a unanimous union members vote and by unsolicited petitions; and
5) The prospect that the plaintiffs might use the lawsuit to advance their political ambitions within the union.

union employees was not reliable and in any event was not controlling, and that plaintiffs' private motives would not affect the merits of the case. In short, there was not antagonism between the plaintiffs and other class members which went to "the subject matter" of the lawsuit.

Here the interests of Mead and Oakley in combatting the sexually discriminatory policies of the defendant surely are coextensive with all past, present and future female employees and with all past, present and future female applicants for employment. The relief sought — whether in the form of front pay, back pay, mandatory hiring of women into better paying jobs such as professional, technical, managerial and supervisory positions, or increased promotional opportunities for women — will benefit all members of the class. Wetzel v. Liberty Mutual Insurance Co., supra, 508 F.2d 247-248, 9 FEP Cases at 217; cf. Jensen v. Continental Financial Corporation, supra, 404 F.Supp. at 811.

[6] Finally, defendant may argue that Mead and Oakley are not adequate representatives because they are no longer employees. That contention is patently without merit. Mead was found by this Court to have been unlawfully discharged. Under this Court's Order, she may elect to be reinstated. Oakley was constructively discharged in retaliation for having exercised her Title VII rights to file a charge with the EEOC. Moreover, it is well settled that, even if the class representatives are no longer employees, they may nonetheless be adequate representatives of a class of past and present employees. See, e.g., Donaldson v. Pillsbury Co., supra, 554 F.2d at 831, n.5, 14 FEP Cases at 1116; Wetzel v. Liberty Mutual Insurance Co., supra, 508 F.2d at 247, 9 FEP Cases at 216; Partham v. Southwestern Bell Telephone, supra, 433 F.2d at 428, 2 FEP Cases at 1023; Reed v. Arlington Hotel Company, Inc., supra, 476 F.2d at 723, 5 FEP Cases at 791.

The Third Circuit has even held that former employees make better class representatives. In Wetzel the Court declared:

> "former employees being familiar with [the company's] employment practices and being free from any possible coercive influence of management, [the plaintiffs] are better situated than either job applicants or present employees to present an intelligent and strongly adverse case against [the company's] discriminatory practices" [quoting from Mack v. General Electric Co., 329 F.Supp. 72, 76, 3 FEP Cases 733, 736 (E.D. Pa. 1971)] Id. at 247, 9 FEP Cases at 217.

The Court further explained why "present employment" should not be a condition of serving as a class representative:

> "Moreover, were the position advanced by Liberty Mutual adopted, *employees would be encouraged to discharge those employees suspected as most likely to initiate a Title VII suit in the expectation that such employees would thereby be rendered incapable of bringing the suit as a class action.*" Id. (Emphasis supplied).

In sum, plaintiffs Mead and Oakley and their counsel have vigorously pursued this matter to date and will continue to represent the class fairly and adequately to the conclusion of this litigation. Accordingly, plaintiffs have met the requirement of Rule 23(a)(4).

VI. The Complaint Satisfies All the Requirements of a Class Action Under Rule 23 (b)(2).

Rule 23(b)(2) permits a suit to be maintained as a class action where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." The Advisory Committee's Note to Proposed Amendments to Rule 23 expressly observes that subdivision (b)(2) is especially appropriate "in the civil rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration." 39 F.R.D. 69, 102 (1966).

Consistent with that statement, the Eighth Circuit recently ruled that,

> Rule 23 (b)(2) certification is appropriate when plaintiffs seek injunctive relief from acts of an employer 'on the grounds generally applicable to the class'. Sex discrimination in employment is such ground. See Donaldson v. Pillsbury Co., 554 F.2d 825, 14 FEP Cases 1111 (8th Cir. 1977); Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 2 FEP Cases 121 (7th Cir. 1969). That back pay may be a form of relief sought incidental to injunctive relief will not preclude certification under Rule 23 (b)(2). Senter v. General Motors Corp., 532 F.2d 511, 525, 12 FEP Cases 451, 462 (6th Cir.), cert. denied, 97 S.Ct. 182, 12 FEP Cases 963 (1976); Society for Individual Rights, Inc. v. Hampton, 528 F.2d 905, 906, 12 FEP Cases 534, 535 (9th Cir. 1975); Rich v. Martin Marietta Corp., 522 F.2d 333, 341, 11 FEP Cases 211 (10th Cir. 1975); Jones v. Diamond, 519 F.2d 1090, 1100 (5th Cir. 1975); Nix v. Grand Lodge of Int'l Ass'n of Machinists, 479 F.2d 382, 385, 83 LRRM 2486 (5th Cir.) cert. denied, 414 U.S. 1024, 94 S.Ct. 449, 38 L.Ed.2d 316, 84 LRRM 2683 (1973); Robinson v. Lorillard Corp., 444 F.2d 791, 802, 3 FEP Cases 653, 660, 661 (4th Cir.), cert. dismissed, 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655 (1971); Bowe v. Colgate-Palmolive Co., supra, 416 F.2d at 720, 2 FEP Cases at 126; Rodriguez v. Swank, 318 F.Supp. 289, 295 (N.D. Ill. 1970), aff'd without opinion, 403 U.S. 901, 91 S.Ct. 2202, 39 L.Ed.2d 677 (1971), Sperry Rand v. Larson, supra, 554 F.2d at 875, 14 FEP Cases at 1459.

See also Wetzel v. Liberty Mutual Insurance Co., supra, 508 F.2d at 250-253, 9 FEP Cases at 219-221; Gilbert v. General Electric Co., 519 F.2d 661, 10 FEP Cases 1201 (4th Cir. 1975); Head v. Timken Roller Bearing Co., 486 F.2d 870, 876 n.6, 6 FEP Cases 813, 815 (6th Cir. 1973).[9]

[9] The commentators also agree that Title VII class actions should be certified under Rule 23(b)(2) even though equitable relief ordered may include back pay awards. 3B Moore's Federal Practice Para. 23.04 at 23-651, n.7; Wright & Miller, Federal Practice & Procedure: Civil § 1776 nn.68 and 69. Back pay awards under Title VII are in nature of equitable relief, Albemarle Paper Co. v. Moody, 422 U.S. 405, 416-417, 10 FEP Cases 1181, 1187 (1975).

[7] Defendant USF&G's unlawful employment policies governing such matters as hiring, recruiting, classifying, training and promotion which are challenged by plaintiffs' Complaint here are applied by defendant against women "across the board" regardless of geographic location. Consequently, final injunctive and declaratory relief with respect to the class as a whole is appropriate. Accordingly, plaintiffs have met the requirements of Rule 23(b)(2).[10]

For the foregoing reasons the Court declares that this action is appropriately maintainable as a class action under Fed. R. Civ. P. 23.

Application by employer for permission to take interlocutory appeal of decision (18 FEP Cases 159) certifying class. Application denied.

See also 18 FEP Cases 131, 442 F.Supp. 102; 18 FEP Cases 136, 442 F.Supp. 109; and 18 FEP Cases 140, 442 F.Supp. 114.

Frank Vogl and Thomas D. Carlson (Best & Flanagan), Minneapolis, Minn., for plaintiffs.

Katherine S. McGovern, Washington, D.C. for intervenor.

Stuart W. Rider, Jr., and Timothy R. Thornton (Rider, Bennett, Egan, Johnson & Arundel), Minneapolis, Minn., and Arthur M. Brewer (Shawe & Rosenthal), Baltimore, Md., for defendants.

Full Text of Opinion

LORD, District Judge: — On November 22, 1977 this Court entered its Order in the matter of Mead, et al. v. United States Fidelity and Guaranty Company determining that same should be maintained as a class action under Rule 23(b)(2), Federal Rules of Civil

[10] Plaintiffs also satisfy the prerequisites of other 23(b) subdivisions, see, Wetzel v. Liberty Mutual Insurance Co., supra. 508 F.2d at 252, 9 FEP Cases at 221.

Procedure. The definition of the class and the rationale for the Court's decision are set forth in detail in the Court's Order and subsequent memorandum. Thereafter, on or about November 29, 1977, defendant United States Fidelity and Guaranty Company applied for certification of the Court's determination pursuant to 28 USC §1292(b) for purposes of taking an interlocutory appeal. For the reasons discussed hereinafter, that application is denied.

Courts have universally held that "permission to allow interlocutory appeals . . . should be granted sparingly and with discrimination." Control Data Corp. v. International Business Machines Corp., 421 F.2d 323, 325 (8th Cir. 1970). See also, Link v. Mercedes-Benz of N. Am., Inc., 550 F.2d 860, 864-865 (3rd Cir. 1977). See generally 9 Moore, Federal Practice, §110.22 [2] at 258 (2d). Mindful of this controlling standard, the Court must weigh the defendant's application against the criteria provided for by Section 1292(b), namely: (1) does the Order involve a controlling question of law, (2) is there substantial ground for difference of opinion, and (3) would an immediate appeal materially advance the ultimate termination of litigation. Also, the Eighth Circuit has suggested in a footnote in Sperry Rand Corp. v. Larson, 554 F.2d 868, 871, n.3, 14 FEP Cases 1455, 1456 (8th Cir. 1977) that a *close* question of fact which otherwise satisfies the requirements of Section 1292(b) might be a proper instance for granting an interlocutory appeal. Finally, certification of an Order under Section 1292(b) is entirely discretionary with the District Court, Link v. Mercedes-Benz of N. Am., Inc., supra, 550 F.2d at 864. This is understandable considering appellate court's distaste for piecemeal review, the delay attendant thereto, and the district court's greater familiarity with the intricacies of the particular litigation in question. See, e.g., In re Cessna Aircraft Distributorship Antitrust Litigation, 518 F.2d 213, 216 (8th Cir. 1975).

While it is necessary for the Court to resolve all of the issues favorably to the moving party before permitting an appeal, this Court finds the present defendant satisfies none of the tests. First, the Court's Order at issue herein does not raise a question of *law*. The Court has plowed no new ground in the construction of Rule 23 or of Title VII, such that an appellate court might reach a different legal conclusion. See, e.g., Sperry Rand v. Larson, supra, Donaldson v. Pillsbury, 554 F.2d 825, 14 FEP Cases 111 (1977), cert. denied ___ U.S. ___, 46 LW 3218, 15 FEP Cases 1184 (No. 77-73, Oct. 3, 1977); Reed v. Arlington Hotel Company, Inc., 476 F.2d 721, 5 FEP Cases 789 (8th Cir. 1973) cert. denied 414 U.S. 854, 6 FEP Cases 607; Parham v. Southwest Bell Telephone Company, 433 F.2d 421, 2 FEP Cases 1017 (8th Cir. 1970).

Likewise, heeding the suggestion of Sperry Rand, a close question of fact has not been presented. The Court has presided over 14 days of testimony with respect to the retaliatory discharge by the defendant of one of the class representatives. In the course of those proceedings, the Court heard substantial testimony implying that the employment practices of the defendant, which affected Ms. Mead and other female employees of the defendant's Minneapolis branch office, originated with the defendant's home office and are common to all female employees, nationwide. See this Court's Findings of Fact, Conclusions of Law, Order for Judgment on Plaintiff Mead's §704(a) Retaliatory Discharge Claim dated September 14, 1977, particularly pages 15, 17-18, 21, 24.

The statistical data contained in the plaintiffs' motion, the EEOC's memorandum in support thereof, and the affidavit of the Assistant General Counsel of the EEOC demonstrate, prima facie, that the allegations of the Minneapolis female employees are not isolated incidents. Accordingly, the interest of judicial economy and fairness to all parties are best served by maintaining this litigation as a class on a nationwide

basis. In this regard and without commenting on the merits of the case, the Court notes the recent holdings of the United States Supreme Court making it unmistakenly clear that statistical analyses are an important source of proving employment discrimination cases. International Brotherhood of Teamsters v. United States, 431 U.S. 324, ____, 97 S.Ct. 1843, ____, 52 L.Ed.2d. 396, 417-420, 14 FEP Cases 1514 (1977). "[Statistics] alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination." Hazelwood School District v. United States, 433 U.S. 299, ____, 97 S.Ct. ____, 53 L.Ed.2d 768, 777, 15 FEP Cases 1 (1977).

Second, the Court does not perceive a substantial ground for differences of opinion. As previously stated, the plaintiffs have made a strong showing in support of their petition to be certified as class representatives, and to date their factual representations have not been subject to substantially different interpretation. The statistical data has its origin with the defendant's own EEO-1 reports. The affidavit of the defendant's Assistant Secretary-Equal Opportunity Coordinator. Doris B. Martin, confirms that 23 separate charges have been filed by female employees against the company in eleven different states.[1] The Court's certification is wholly consistent with the rulings of the Eighth Circuit on Title VII class actions. The Eighth Circuit has even observed that allegations of "employment discrimination by definition suggest class wide discrimination, and accordingly class action requirements are to be broadly interpreted." Sperry Rand Corp. v. Larson, supra, p. 554 F.2d at 872, 14 FEP Cases at 1457.

Third, an early appellate opinion on the class certification, whether for or against the defendant, will not materially advance the termination of this litigation. At present two former female employees of the

[1] Moreover, the certification is conditional and this Court has retained jurisdiction to modify the order as may be appropriate consistent with any subsequent discovery or developments in the litigation.

defendant are named plaintiffs. This Court is advised that two additional former female employees will shortly be joined by stipulation of counsel. In light of these circumstances, the defendant has urged the Court to limit the class to the State of Minnesota. However, it appears to the Court that the discovery and proof with respect to the claims of the female employees in the State of Minnesota would largely parallel the proceedings for a nationwide class. Thus, the scope of the issues would not be materially narrowed, only the number of people affected by it. Following the defendant's suggestion to certify only a Minnesota class will not result in the evaporation of the lawsuit.

Additionally, the EEOC has been joined as an intervenor in this action. See this Court's Order dated December 20, 1977. Therefore, the only practical manner of resolving the alleged discrimination for all the interested parties is on a nationwide basis.

Defendant's central objection to the class certification is founded on the alleged unmanageability of the nationwide class.[2] This problem, if it be one, is clearly for the district court to decide and not the type of issue to be certified under §1292(b). See, Link v. Mercedes-Benz of N. Am., Inc., supra, 550 F.2d at 863-864, wherein the Third Circuit explained:

> "Section 1292(b) is not designed for review of factual matters but addresses itself to a controlling question of law.
>
> * * *
>
> Manageability is a practical problem and primarily a factual one with which the district court generally has greater familiarity and expertise than does a court of appeals. Consequently, this is an area in which the trial court must of necessity be granted a wide range of discretion.

[2] Defendant's brief in support of the application recites:

> "Defendants have attempted on numerous occasions to impress upon the Court the magnitude and the unmanageability of the litigation that will be occasioned by the certification of a nationwide class in this case."

> There are no circumstances in this case which makes manageability a controlling question of law and we therefore will not answer the questions submitted."

Finally, the defendant's other arguments such as the alleged automony of each branch office and adequacy of the plaintiffs to represent the class clearly go to the merits of the action and the Eighth Circuit does not wish to entertain these questions in an interlocutory fashion. See, In re Cessna Aircraft Distributorship Anti-trust Litigation, supra, 518 F.2d at 316,[3] wherein the Court stated:

> "Nor do we feel the issue here so divorced from the merits that effective review cannot be had after a final judgment is entered. Cessna's contentions regarding the property of the district court's order focus on the ability of White Industries to serve as the class representative. Cessna argues that White Industries, Inc., as a former dealer has a conflict of interest with present dealers that make it an unfit representative. In addition, Cessna argues that the claims of price discrimination in the Robinson Patman Act case are individualized as to each dealer and cannot be the subject of class action treatment. Obviously, if the court were to entertain these issues it would be plunging headlong into the merits of the case. Each of these issues can be raised and fully ventilated on appeal following a final judgment. Consideration at this time would serve no justifiable judicial purpose."

NOW THEREFORE, after due consideration the Court finds:

A. The Court's Order does not raise a controlling question of law or close factual question.

B. There is not substantial ground for difference of opinion with respect to the contents of said Order.

[3] Cessna was cited and quoted with approval repeatedly by the Eighth Circuit in Sperry Rand, *supra*, 554 F.2d at 871, n.3, 872, 873, 876, 14 FEP Cases at 1456, 1457, 1458.

C. An immediate appeal will not materially advance the ultimate termination of the litigation.

IT IS ORDERED That the defendant's application be and the same hereby is denied.

IT IS SO ORDERED.

Federal Rules of Civil Procedure

Rule 23. Class Actions.

(a) PREREQUISITIES TO CLASS ACTION. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) CLASS ACTIONS MAINTAINABLE. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> > (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
> >
> > (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunc-

tive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) DETERMINATION BY ORDER WHETHER CLASS ACTION TO BE MAINTAINED; NOTICE; JUDGMENT; ACTIONS CONDUCTED PARTIALLY AS CLASS ACTIONS.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those

whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) ORDERS IN CONDUCT OF ACTIONS. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) DISMISSAL OR COMPROMISE. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-942

UNITED STATES FIDELITY AND GUARANTY COMPANY,

Petitioner,

vs.

THE HONORABLE MILES W. LORD, Judge of the United States District Court, District of Minnesota, Fourth Division,

Respondent,

and

SHEILA MEAD and TERRY OAKLEY, and all other persons similarly situated, and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS MEAD AND OAKLEY IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS MEAD AND OAKLEY IN OPPOSITION

Respondents Mead and Oakley respectfully request that this Court deny the petition for writ of certiorari, seeking

review of the Eighth Circuit's opinion in this case. That opinion is reported at 585 F.2d 860 (1978).
(1978).

QUESTION PRESENTED

Whether the Court of Appeals properly refused to issue a writ of mandamus to compel the District Court to vacate its order determining that this action brought under Title VII of the Civil Rights Act of 1964[1] may be maintained as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

STATEMENT OF FACTS

On May 5, 1976, Respondents Mead and Oakley, two women employed at the Minneapolis office of petitioner, filed with the Equal Employment Opportunity Commission ("EEOC") on behalf of themselves as well as all other females employees and applicants for employment charges of company-wide sex discrimination. On January 7, 1977, Mead was fired in retaliation for exercising her Title VII rights. Six days later, respondents herein filed a class action complaint in the United States District Court, District of Minnesota, alleging that petitioner has engaged and continues to engage in company-wide policies and practices of discriminating against female employees and applicants for employment because of their sex in violation of Title VII. At that same time, Mead sought a temporary restraining order enjoining petitioner from retaliating against her for having exercised Title VII rights.[2] On September 14, 1977, after fourteen days of hearings spanning a nine month period, the District Court found that Mead had been illegally discharged in retaliation for exercising her statutory right to file an EEO charge. Among other things, the Court found that Mead's illegal discharge had been orchestrated from petitioner's headquarters in Baltimore (Pet. at 31a, 33a, 37a, 41a). *Mead v. United States Fidelity and Guaranty Company*, 442 F. Supp. 114 (D. Minn. 1977).

On May 3, 1977, the EEOC moved to intervene on those aspects of the case alleging a company-wide pattern of sex discrimination.[3] In support of its motion, the General Counsel of the EEOC certified that "the Commission has determined this action to be of general public importance in accordance with Section 706(f)(1) of Title VII. . . ." The class allegations of the EEOC's complaint-in-intervention are substantially identical to those in the complaint of Mead and Oakley.[4]

[1] 78 Stat. 253, Pub. L. 88-352, amended by Pub. L. 92-261, Pub. L. 93-608, Pub. L. 95-251 and Pub. L. 95-555 (codified at 42 U.S.C. §§ 2000e *et seq.* (1970 ed and Supp. V)).

[2] Pursuant to stipulation, the District Court on February 3, 1977, consolidated Mead's motion for preliminary relief with the petition of the EEOC for temporary relief.

[3] A Commissioner's charge under Section 707 of Title VII alleging, among other things, that petitioner has engaged in company-wide sex discrimination was filed August 16, 1974. Powell v. USF&G (EEOC Charge No. TBA5-0336). For litigation resulting from the EEOC's investigation of that charge see, EEOC v. USF&G, — F.Supp. —, 11 FEP Cases 859 (D.Md. 1975); EEOC v. USF&G, — F.Supp. —, 13 FEP Cases 990 (D.Md. 1975) (granting enforcement of EEOC subpeona), *aff'd per curiam*, 538 F.2d 324 (4th Cir. 1976), *cert. denied* 429 U.S. 1023 (1976); EEOC v. USF&G, 420 F.Supp. 244 (D. Md. 1976) (granting enforcement of EEOC subpoena); EEOC v. USF&G, — F.Supp. —, 14 EPD ¶7528 (D.Md. 1977) (denying contempt motion of EEOC).

[4] On August 15, 1977, prior to ruling on the motion to intervene and in accord with the Eighth Circuit's guidelines on intervention established in Johnson v. Nekoosa Edwards Paper Co., 558 F.2d 841 (1977), *cert. denied sub. nom.* Nekoosa Papers, Inc. v. Equal Employment Opportunity Commission, 434 U.S. 920, the District Court ordered the parties to engage in conciliation, 442 F.Supp. 109.

On October 5, 1977, Respondents Mead and Oakley moved for an order certifying the case as a class action. In addition to the evidence presented during the fourteen days of Mead's retaliatory discharge trial which included such documents as standardized personnel forms and Guides to Personnel Practices used throughout petitioner's organization, respondents relied upon the affidavit of David Zugschwerdt, Assistant General Counsel of the EEOC and custodian of its investigative files. The affidavit informed the Court that there were pending against petitioner 23 EEO charges as well as the §707 Commissioner's charge.[5] Further, it advised the District Court that the EEOC's investigation of 10 branches and the headquarters:

> "reveal[s] a uniform pattern of concentration of females into non-professional, non-managerial, non-professional supervisory and nontechnical positions. This concentration is the direct and foreseeable result of USF&G's employment practices whereby vacancies in professional trainee, professional, professional supervisory, managerial, and technical positions are filled by word-of-mouth recruitment by incumbents in these positions, more than 90% of whom are Anglo males, the acquiescence in and approval of these recruitment practices and the resultant hires by headquarters, and the deliberate refusal to either promote from the incumbent female pool or to recruit from the external female pool."

[5]Although six charges allege racial discrimination, all 23 are filed by women and raise one or more systemic allegations made in the Commissioner's pattern and practice charge. The 23 charges span a period from 1972 to the present and come from eleven different locations. On September 15, 1978, one of the charging parties filed a company-wide class action on behalf of all Black female employees and applicants. Green v. United States Fidelity and Guaranty Company, 78-0706-CV-W-4 (W.D.Mo.).

Statistical analyses of petitioner's EEO-1 reports for the period 1971 through 1975[6] attached to the affidavit illustrated that men have held a grossly disparate number of the professional jobs.[7] "These analyses," the Zugschwerdt affidavit informed the Court,

> "support the conclusion that the absence of female employees in managerial, professional, supervisory, professional, professional trainee and technical positions over a five year period in each of USF&G's offices is not due to happenstance, but directly and forseeably results from employment policies and practices which discriminate against females as a class nationwide due to their sex."

Finally, the EEOC Assistant General Counsel's affidavit advised the Court that:

> "The Commission's investigation has disclosed that employment decisions affecting employees and applicants for employment at professional trainee levels and above are not made automonously by personnel in each branch office."

On November 22, 1977, the District Court ordered that the action be conditionally certified as a Rule 23(b)(2) class action on behalf of a class defined as "all past, present, and future women employed by defendant United States Fidelity and Guaranty Company in any of its offices in the United States since July 5, 1965 and all past,

[6]Section 709(c) of Title VII requires an employer to file annually EEO-1 reports with the EEOC which show the relationship of minority and female employees to its total workface in specified job categories.

[7]Although women constituted over 38% of the civilian labor force and earned 43% of the college degrees confirmed during the relevant time period, petitioner's EEO-1 reports established that men held over 93% of the professional jobs in 1971; almost 92% of those jobs in 1972; over 89% in 1973; 87% in 1974 and over 85% in 1975.

present and future female applicants for employment with defendant United States Fidelity and Guaranty at any of its offices in the United States since July 5, 1965." Thereafter, it issued a detailed memorandum regarding its class certification order (Pet. at 57a).

Following the District Court's denial of its application for interlocutory appeal (Pet. at 75a-80a), petitioner applied to the Eighth Circuit for a writ of mandamus compelling the District Court to vacate the class certification order, to limit the class to the Minneapolis branch office and to vacate its order granting the EEOC leave to intervene on an unlimited basis.[8]

On September 13, 1978, in a unanimous opinion written by the Honorable William H. Becker, the Court of Appeals denied the petition in every respect (Pet. at 1a-12a). Applying the rule established in *In Re Cessna Aircraft Distributorship Antitrust Litigation*, 518 F.2d 213 (8th Cir. 1975), *cert. denied*, 423 U.S. 947, *reh. denied*, 423 U.S. 1039, it held that the extraordinary writ of mandamus would not lie to review the lawful exercise of discretion by the District Court where there was absolutely no showing that it abused its judicial power in granting the class action certification (Pet. at 9a). The Court of Appeals expressly found that there "was ample evidence before the district court to support the exercise of its discretion to certify a national class" (Pet. at 10a). It also observed that "the district court entered a carefully prepared memorandum of findings of fact, conclusions of law, and affirmation of its prior order certifying the action as a class action," attaching as an addendum the full text of the lower court's memorandum (Pet. at 5a).

[8]The petition for writ of certiorari expressly does not seek review of the Circuit Court's denial of mandamus with respect to the cut-off date for class membership or the District Court's order granting the EEOC leave for permissive intervention (Pet. at 5, n.2).

The Court of Appeals declared the *Cessna* rule is consistent with the recent decisions of this Court "forbidding piecemeal review of class action orders in the absence of a certification of a discretionary interlocutory appeal by a district court under Section 1292(b), Title 28. U.S.C. *Coopers & Lybrand v. Livesay*, — U.S. —, 98 S. Ct. 2454, 57 L.Ed.2d 351 (1978); *Gardner v. Westinghouse Broadcasting Co.*, — U.S. —, 98 S. Ct. 2451, 57 L Ed.2d 364 (1978)" (Pet. at 10a.)[9]

REASONS FOR DENYING THE WRIT

1. The Eighth Circuit correctly ruled that mandamus is unavailable to compel vacation of a discretionary class certification order.[10]

As recently as Last Term, this Court reaffirmed that a writ of mandamus may be issued only in exceptional circumstances "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so" *Will v. Calvert Fire Insurance Co.*, -- U.S. —, 98 S.Ct. 2552, 2557, 57 L.Ed.2d 504, 511 (1978), quoting *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943). "It is essential that the moving party satisfy 'the burden of show-

[9]On December 29, 1978, pursuant to Section 706(f)(5) of Title VII and the written consent and stipulation of all the parties, the District Court referred this case to a special master.

[10]USF&G does not allege, and there does not appear to be, any conflict among the courts of appeals on this issue.

ing that its right to the issuance of the writ is 'clear and indisputable.' " *Ibid.*, quoting *Bankers Life & Cas. C.* v. *Holland*, 346 U.S. 379, 384 (1953).

Petitioner fails to allege and plainly does not show by "clear and indisputable evidence" that it meets either of those standards. It does not contend that the District Court was in any sense without "jurisdiction" to certify this Title VII action as a class action. Title VII unquestionably confers jurisdiction on District Courts to certify as class actions suits such as this alleging company-wide sex discrimination. Indeed, such actions are "by their very nature class suits, involving classwide wrongs." *East Texas Motor Freight Systems, Inc., v. Rodriguez*, 431 U.S. 395, 405 (1977).

Nor does petitioner argue that the District Court failed to exercise "its authority when it is its duty to do so." Rather, by using the labels "mandamus" and "abuse of discretion," petitioner seeks interlocutory review of a non-appealable class certification on the mere ground that it may be erroneous. This Court has repeatedly condemned such semantics and refused to issue mandamus relief. *Will v. Calvert Fire Insurance Co., supra*, 98 S. Ct. at 2559 n. 7, 57 L.Ed.2d at 514 n. 7; *Will v. United States*, 389 U.S. 90, 98 n. 6 (1967).

The mislabeling is peculiarly ill founded in light if the Court of Appeals finding that "there was ample evidence before the district court to support the exercise of its discretion to certify a national class." (Pet. at 10a). Where a matter, such as the class certification order here, "is committed to the discretion of a district court, it cannot be said that a litigant's right" to the issuance of the

extraordinary writ of mandamus "is 'clear and indisputable.' " *Will v. Calvert Fire Insurance Co., supra*, 98 S. Ct. at 2559, 57 L.Ed.2d at 514.

2. None of petitioner's alleged reasons warrant granting the petition.

Petitioner seeks certiorari review on the grounds that the class action order presents this Court with "an opportunity to consider the problem of class certification" (Pet. at 10), as it relates to "costly litigation" (Pet. at 7-9) and alleged unmanageability (Pet. at 11-13). Even if considered in a less restrictive context than the writ of mandamus proceeding, petitioner contentions are totally without merit.

First, contrary to petitioner's contention that "[t]his Court has devoted virtually no attention to the problem of class certification" (Pet. at 10), this Court just Last Term, on two separate occasions, addressed the issue of interlocutory appellate review of class determinations and ruled unanimously that, absent a certification by the District Court for discretionary appeal, class determinations are not subject to interlocutory review. *Coopers & Lybrand v. Livesay, supra; Gardner v. Westinghouse Broadcasting Co., supra.* These decisions along with *Calvert Fire Insurance Co., supra*, hold that a class determination is neither reviewable under more conventional notions of appellate jurisdiction nor by way of the extraordinary writ of mandamus.[11] The Eighth Circuit expressly relied on

[11]Petitioner did not seek appellate review of the class action order pursuant to 28 U.S.C. §1291. It did, however, pursuant to 28 U.S.C. §1292(b), seek permissive interlocutory review of the class determination which was denied by the District Court (Pet. at 75a-81a). Petitioner did not seek mandamus review of the order denying its §1292 (b) application.

those opinions (Pet. at 9a-10a). In short, this Court gave full consideration Last Term to the very class certification issue raised here and there is no need address that matter again.

Petitioner's underlying contentions for certiorari review fail for the same reasons as the "death knell" doctrine did in *Coopers & Lybrand*. There the suggestion of an appealability rule for a class decertification order that turned on the amount of the plaintiff's claim was rejected for a variety of reasons. The proposed rule, which would make appealability hinge on an arbitrarily selected jurisdictional amount, was recognized to be "plainly a legislative, not a judicial, function." 98 S.Ct. at 2460, 57 L.Ed. 2d at 360.[12] This Court declared that such a rule would have "a serious debilitating effect on the administration of justice" because of the potential waste of judicial resources resulting from repeated interlocutory appeals. *Ibid.* "Perhaps the principal vice" of the doctrine, however, was that "it authorizes *indiscriminate* interlocutory review of decisions made by the trial judge," thus circumventing the restrictions imposed by the Interlocutory Appeals Act of 1958, 28 U.S.C. §1292(b). 98 S.Ct. at 2461, 57 L.Ed.2d at 361.

Finally, this Court condemned the suggested rule because it "thrusts appellate courts indiscriminately into the trial process and thus defeats one vital purpose of the final judgment rule—'that of maintaining the appropriate relationship between the respective courts. . . . This goal, in

[12]The Court expressly noted that "the probable cost of the litigation" was one of a variety of factors the plaintiff would consider in deciding whether to press the claim in light of a decertification order. 98 S.Ct. at 2459 n.15, 57 L.Ed.2d at 359 n.15.

the absence of most compelling reasons to the contrary, is very much worth preserving.' " 98 S.Ct. at 2462, 57 L.Ed. 2d at 363 quoting from *Parkinson v. April Industries, Inc.*, 520 F.2d 650, 654 (2d Cir. 1975).

Mandamus review of a class certification order tied to petitioner's alleged defense costs and its speculation concerning manageability suffers from the same arbitrariness found in *Coopers & Lybrand*.[13] Such review would inflict the same devasting impact on scarce judicial resources. Like the "death knell" doctrine discredited in *Coopers & Lybrand*, mandamus review of this order would also violate the restrictions imposed by the Interlocutory Appeals Act. See also, *Gardner v. Westinghouse Broadcasting Co.*, 98 S.Ct. at 2453, 57 L.Ed.2d at 367-368. Adoption of petitioner's proposal would thrust the Court of Appeals indiscriminately into the merits of this action and the trial process, thereby defeating one of the vital purposes of the final judgment rule—the maintenance of the appropriate relationship between the respective courts. *Cooper & Lybrand*, 98 S.Ct. at 2461-2462, 57 L.Ed.2d at 362-363.

Thus, in addition to failing because "[m]andamus . . . may never be employed as a substitute for appeal in der-

[13]"Certification of a large class may so increase the defendant's potential damage liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense. *Yet the courts of appeals have correctly concluded that orders granting class certification are interlocutory.*" 98 S.Ct. at 2462, 57 L.Ed. at 362. (Emphasis added).

This Court has also made it crystal clear that litigation costs are not a basis for issuing the extraordinary remedy of mandamus, "[t]he writ [of mandamus] is not to be used as a substitute for appeal . . . even though hardship may result from delay and perhaps unnecessary trial." Schlagenhauf v. Holder, 379 U.S. 104, 110 (1964).

ogation of these clear policies" prohibiting pricemeal review, *Will v. United States, supra* 389 U.S. at 97, petitioner's contentions for certiorari, even if judged in a much less restrictive context, were wholly rejected by two unanimous decisions of this Court Last Term.

3. The record does not support petitioner's claim.

There is no evidence in the record to suggest the presence of a manageability problem. To the contrary, the Court of Appeals found that "ample evidence" supported the certification order and that the action was presently manageable (Pet. at 10a). In light of this record and the fact that circumstances have not changed since the Eighth Circuit's decision, petitioner's argument regarding manageability is sheer speculation which certainly does not merit this Court's attention.

4. Certiorari review will not materially advance the ultimate termination of this litigation.

The District Court permitted the EEOC to intervene "on an unlimited basis" and to file a complaint in intervention which, in substantially identical terms as the Mead-Oakley action, alleges company-wide sex discrimination. The Eighth Circuit refused to issue a writ of mandamus requiring the District Court to vacate that intervention order. (App. 11a-12a). Petitioner has not sought review of the EEOC intervention issue here (Pet. at 5 n. 2).

Under the Eighth Circuit's decision in *Johnson v. Nekoosa-Edwards Paper Co., supra,* the EEOC's intervention here is not limited to scope of the Mead-Oakley action but rather may be broader than the private action.

Consequently, even if, as urged by the petitioner, the Mead-Oakley action were limited to Minnesota, the District Court's order permitting the EEOC to pursue allegations of company-wide sex discrimination remains in full force and effect.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 78-942

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES FIDELITY AND GUARANTY COMPANY,
PETITIONER

v.

THE HONORABLE MILES W. LORD, JUDGE,
UNITED STATES DISTRICT COURT, DISTRICT
OF MINNESOTA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 585 F. 2d 860. The decision of the district court (Pet. App. 32a-41a) appears at 18 F.E.P. Cases 158. Other district court opinions in this matter are reported at 442 F. Supp. 114, 18 F.E.P. Cases 140, and at 18 F.E.P. Cases 131, 136, 167 and 169.

JURISDICTION

The judgment of the court of appeals was entered on September 13, 1978. The petition for a writ of certiorari was filed on December 12, 1978. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals erred in refusing to grant a writ of mandamus to review a provisional class action determination.

STATEMENT

Petitioner United States Fidelity and Guaranty Company seeks review of the refusal of the court of appeals to issue a writ of mandamus to decertify a class action brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*[1]

Respondents Shelia Mead and Terry Oakley filed this action under Title VII of the Civil Rights Act of 1964, alleging that they individually, and as members of a class of former and current female employees, were subjected to company-wide discrimination based on sex with regard to professional and managerial positions.[2] The district court granted a conditional certification under Rule 23 of the Federal Rules of Civil Procedure. The class consists of current and former female employees and applicants for employment, who were employed in any of petitioner's facilities since July 1965. The order specifically provided that the certification was provisional in nature under Rule 23(c)(1), subject to revision and amendment at any time until final judgment.

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[1]Petitioner is not seeking review of the court of appeals' refusal to vacate an order granting intervention on a nationwide basis to the Equal Employment Opportunity Commission (EEOC) (Pet. 5. n.2). Prosecution by the EEOC of its nationwide action against petitioner will thus be unaffected by the disposition of the petition.

[2]In addition, plaintiff Mead, and the EEOC in a separate action, alleged that the company had retaliated against Mead for having filed a charge with EEOC. After a consolidated trial on that issue, the judge found that the company had engaged in acts of retaliation (Pet. App. 15a-32a).

Petitioner applied to the court of appeals for a writ of mandamus to decertify the class action. The court of appeals declined to issue the writ on the ground that the trial court did not exceed its authority in granting the class-action order. The court of appeals found that the order was based on "ample evidence before the district court to support the exercise of its discretion to certify a national class" (Pet. App. 11a).

ARGUMENT

Since petitioner does not seek review of the judgment below upholding intervention by EEOC on a complaint in intervention alleging nationwide discrimination (see note 1, *supra*), the question presented in the present petition is of little practical significance. The claim of undue expense in defending a nationwide class action is unfounded inasmuch as litigation of the EEOC complaint would involve nationwide discovery and trial in any event. Moreover, considerations of expense alone do not warrant the issuance of a writ of mandamus. *Bankers Life & Casualty Co.* v. *Holland,* 346 U.S. 379, 383-384 (1953).

At all events, the decision below is correct. Petitioner's application for a writ of mandamus to decertify a class action is merely an attempt to obtain appellate review of this interlocutory, provisional order relating to class certification. Such orders are not appealable prior to final judgment. *Coopers & Lybrand* v. *Livesay,* No. 76-1836 (June 21, 1978); *Gardner* v. *Westinghouse Broadcasting Co.,* No. 77-560 (June 21, 1978).

Nor is such an order reviewable by mandamus in the circumstances of this case. Petitioner complains that the conditional certification by the district court was an abuse of discretion because the differing factual circumstances of various women employees in offices all over the country are not susceptible to manageable proof (Pet. 11-12). The court of appeals, however, found that there was

ample evidence to support the district court's provisional conclusion that there existed a sufficient commonality between jobs at various locations as well as a uniformity in centralized policies to justify a preliminary determination that the action is a class action under Rule 23(b) (Pet. App. 5a, 6a, 11a-12a). The district court's determination was made after the case was pending for more than ten months and after an extended trial on the individual claim of retaliation (see Pet. App. 15a-32a), and is subject to further consideration and possible modification as the evidence in the case develops.

Whether evaluated under the "clear abuse of discretion" standard set forth in *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249, 257 (1957), or in light of the purpose of mandamus to compel a district court to exercise its authority, *Will* v. *United States*, 389 U.S. 90, 95 (1967), the court of appeals' refusal to issue the writ was proper. Since petitioner's right to the writ is not "clear and indisputable," *Will* v. *Calvert Fire Ins. Co.*, No. 77-693 (June 23, 1978), slip op. 6 (plurality opinion), the writ was properly denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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